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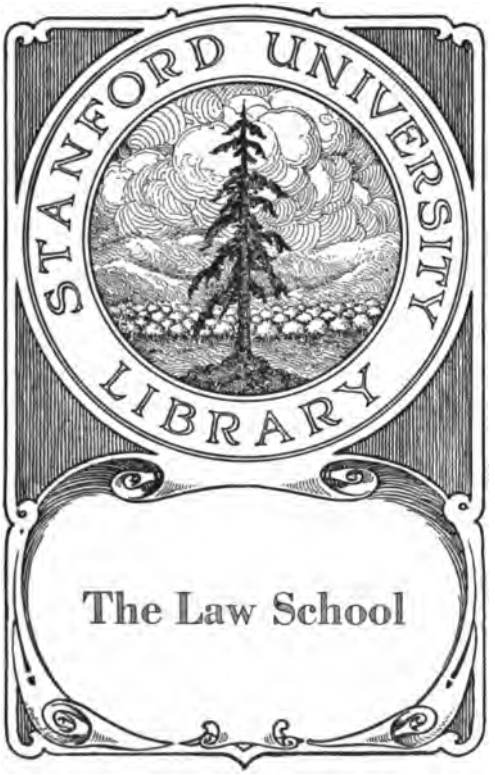
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COMMENTARIES

ON THE

LAW OF SURETYSHIP,

AND THE

Rights and Obligations of the Parties thereto;

AND HEREIN OF

OBLIGATIONS IN SOLIDO,

2617

UNDER

THE LAWS OF ENGLAND, SCOTLAND, AND OTHER STATES OF EUROPE, THE BRITISH COLONIES, AND UNITED STATES OF AMERICA,

AND

ON THE CONFLICT OF THOSE LAWS.

BY

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PREFACE.

It was my original intention that the contracts of suretyship, partnership, and agency, and the law of bills of exchange and promissory notes, should form part of the Commentaries on Colonial and Foreign Law; but my unwillingness to increase the length to which that publication in its present state had extended, and my desire to ascertain the reception which it would experience from the Profession, induced me to confine it to the subjects of which it treats. I should not evince my sense of the liberality, or my estimation of the opinions expressed by the eminent persons on the Bench and at the Bar of this country, and by distinguished foreign jurists, if I had not considered that its reception justified and encouraged the execution of my original intention. The communication which I received from one of those jurists, the late Mr. Justice Story, afforded me the happiness of a correspondence with that excellent man, which was continued until his lamented death. It led to our imparting to each other the subjects of jurisprudence

which had engaged our attention, with a view to the publication of our writings on them. I found that he had prepared, or was preparing, and the Profession of this and every other country has had the advantage of becoming acquainted with his admirable Commentaries on the Law of Bailment, Partnership, Agency, Bills of Exchange and Promissory Notes. He did not, however, intend to treat of the Law of Suretyship. He expressed his wish, and I gave him my promise, that I would complete and publish what I had written on this subject of jurisprudence. The little time which was not occupied by the duties of my Profession, was too much engrossed by the arduous and more irksome duties of the office of Agent of Jamaica, which until very recently was held by me, to allow me to make any progress in this Work. As soon as I could command the requisite leisure I proceeded to complete it. I considered that in thus performing my promise to Mr. Justice Story, I was discharging a debt which I owed to the memory of him who was the object of my personal esteem and respect, and who had conferred the greatest benefits on the jurisprudence of every country by the tendency of his writings to promote the most advantageous study, and the most sound and useful application of it.

It has been my object in treating of the Contract of Suretyship, and the rights and obligations of the parties to it, to present the jurisprudence of the different countries in Europe, and of the States of

America, either as it resembles or differs from, or illustrates the law of England on this important subject of jurisprudence.

The extensive and uninterrupted intercourse which now happily subsists between Great Britain and other nations of the world, and the questions of foreign law which are continually brought before the Judicial Committee on Appeals from those British West India Colonies which retain the laws of France, Holland, and Spain, would seem to render an acquaintance with general jurisprudence indispensable, for the mere purpose of enabling the Advocate to answer the calls which would be made upon him for his professional services. But even without this professional motive for its acquisition, it is, and must be an essential part of legal education, if it be really intended to supply the student with those attainments which will adequately qualify him for his Profession, and render the success of its exercise dependent on himself and on the extent of his attainments, and wholly independent of all adventitious and extrinsic advantages.

The Civil Law has had so extensive an influence upon every judicial system in Europe, and such is its own intrinsic excellence, that the student can take no step in the study of any particular system of jurisprudence without feeling the necessity of directing his attention to it. He finds that every system of jurisprudence has copiously drawn from that rich source,

principles and maxims of justice and injustice, capable of being applied, and which have been applied to all the various relations and actions of civilized life, that those principles and maxims have been regarded as valuable lessons, and followed as guides in investigating and deciding all the various and complicated questions which are continually occurring in the extended range of social intercourse. It supplies him with those deductions of reason to which there must always be a resort, when from the absence of positive authority the decision can proceed only on general grounds of rational jurisprudence.

The study of general jurisprudence, and necessarily of the Civil Law has formed a part of the course of legal education, which has been recommended by some of the eminent persons who have adorned the Bench and Bar of this country. It forms a part of legal education in every University in Europe and America. It has in its favour the testimony of Lord Brougham, Lord Campbell, Mr. Starkie, Mr. Bethell (*a*), Mr. Empson, Mr. James Stewart, Mr. Austin, and the other learned persons who were examined before Mr.

(*a*) The measure recently proposed by Mr. Bethell, and adopted by the Benchers of the Middle Temple, is a most valuable movement towards the establishment of such a course of education. The utility and success of the Lectures on Civil Law, and their effect in promoting an acquaintance with general jurisprudence, must depend entirely on the manner in which the Lecturer, however conversant he may be with the Civil Law, selects, arranges, and presents its principles and maxims to his Students, and on the use and application he makes of them.

Wyse's Committee, as well as the opinions and writings of the late Mr. Justice Story, Mr. Chancellor Kent, Professor Greenleaf, and other foreign jurists (*a*).

In a recent article of one of our influential Reviews, (the Edinburgh Review for October, 1846), in the daily Journals, and particularly in that Journal (the Times) which often directs, and rarely, if ever, speaks but in unison with the public feeling, it is asserted, and it cannot be denied that there has been, and is, a decline in the character and influence of the Bar.

Its progress can be arrested only by requiring as indispensable qualification for the degree of a barrister, a previous legal education, of so comprehensive a character, containing such subjects of study, and devoted to such objects, that the attainments brought to the exercise of the Profession, shall not be the mere technicalities of law acquired by the strength of memory,

(*a*) See Lord Campbell's Lives of the Lord Chancellors of England, particularly those of Lords Nottingham, Somers, and Talbot. The estimation in which these eminent persons, as Chancellors, are held, is a practical illustration of the advantages derived from the study of Civil Law and Foreign Jurisprudence, as a part of legal education. The noble and learned Biographer has recommended it by his own opinion, to which his well-merited success, his high rank, and great experience at the Bar must give very considerable weight. This admirable Biography has received from the public approbation so universal and so unqualified, that any addition to it offered by an individual may seem like presumption. But it may be permitted me to say, that I know not of any Biographical Work which ever so fully accomplished its professed object, difficult as it was to be accomplished, or which more largely contributed to the sources from which the Lawyer and the Statesman may derive the most valuable instruction and information.

but the great principle of the science of the law acquired by the development of the reasoning power, and derived from the experience of all ages and countries.

The plan of this work, in combining the civil law and the jurisprudence of other countries with the law of England, has been adopted by me, from the conviction that it affords the best means of explaining, understanding, and applying that law. If the execution of that plan shall in any degree confirm and promote the disposition which now prevails, to make general jurisprudence a branch of the education of a candidate for the Bar, I shall have evinced my deep interest in, and my sincere attachment to, a Profession in which my life has been passed.

It will be perceived, that in treating of the constitution and form of the contract of suretyship, and the rights and obligations of the parties to it, and of their extinction and discharge, many of the rules and principles were equally applicable to contracts in general.

The law relative to obligations *in solido*, or joint and several obligations, in some respects so much resembles, and in others is so essentially distinguished from the law relative to suretyship, that this work would not be so complete as it ought to be if it had been omitted.

It was necessary to treat of certain parts of the bankrupt law, for the purpose of shewing the effect of the bankruptcy of the principal or surety on the rights and obligations which were derived from the contract.

The Author takes this opportunity of acknowledging his obligation for the assistance he has derived from Mr. PITMAN'S "Treatise on the Law of Principal and Surety," so far as relates to the law of this country.

As the law of England differs in many respects from that of other countries, both as to the nature, constitution, and form of the contract of suretyship, and of the rights and obligations of the contracting parties, as to the extinction and discharge of those rights and obligations, and on the effect of bankruptcy, it was a necessary part of this Work to treat of the particular law which in these cases of conflict should be adopted.

WILLIAM BURGE.

May 6th, 1849.
13, *Chancery Lane.*

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COMMENTARIES

ON THE

LAW OF SURETYSHIP, &c.

BOOK I.

THE CONTRACT OF SURETYSHIP.

CHAPTER I.

1. Its definition by the Civil Law; the Law of France; of Spain; West India Colonies; Canada; Mauritius; States of America; its nature, accessary, or collateral to an obligation on the part of the principal debtor; how far it must follow the principal debt or obligation.—2. For what the surety may become bound, present or future debt, definite or indefinite amount.—3. By whom the obligation may be contracted, and for whom.—4. Effect of the obligation when the person for whom the party is surety is incapable of contracting.—5. Peculiarity of the law of England in requiring a sufficient consideration for the contract of the surety when it is not under seal. The British Colonies and the States of America, in which this law is adopted.

In the Civil Law the contract or obligation of suretyship is called *fide jussio* (*a*).

The following definition precisely marks its constitution, character, and object, "Nihil aliud est, quam stipulatio, sive contractus verbis initus, quo quis alicuam obligationem ob majorem creditoris securitatem, ita in fidem suum recipit, ut principalis debitor nihilominus maneat obligatus" (*b*).

(*a*) Inst. lib. 3, tit. 21. Dig. lib. 46, tit. 1. Cod. lib. 8, tit. 41. Voet. lib. 46, tit. 1. Perez. ad Cod. lib. 8, tit. 41. Zoes. ad Pand. lib. 46, tit. 1. Hopp. ad Inst. lib. 3, tit. 21. Vinnius ad Inst. lib. 3, tit. 1. Stryk. tom. 2, 1092.

(*b*) Dig. lib. 46, tit 1. Lauterb. lib. 46, tit. 1, § 1.

The person who contracts this obligation is called the *fidé jussor*, "Fide jussor est qui alieno creditori id, quod ei debetur, promittit, stipulatione interveniente, et eo animo ut debitoris obligationi accedat" (*c*).

In the law of France the obligation is called *cautionment*, and the person by whom it is given *caution*.

The definition given by Pothier resembles that which has been already cited, "Le cautionnement est un contrat, par lequel quelqu'un s'oblige pour un débiteur envers le créancier, à lui payer en tout ou en partie ce que ce débiteur lui doit, en accédant à son obligation.

"On appelle *caution* ou *fidéjusseur*, celui qui contracte une telle obligation" (*d*).

The Code Civil thus describes the obligation contracted by the surety.

"Celui qui se rend caution d'une obligation, se soumet envers le créancier a satisfaire à cette obligation, si le débiteur n'y satisfait pas lui-même" (*e*).

In the law of Spain the obligation is called *Fiadura*, and the surety *Fiador*.

Fiador tanto quiere decir como home pue da su fe et promete á otro de dar ó de facer alguna cosa por mandado ó por ruego de aquel quel mete eu la fiadura. Et tiene grant pro á aquel quel rescribe; ca es por eude mas seguro de aquello quel han á dar ó de facer, porque fincan amos á dos obligados, tambien el fiador como el debdor principal (*f*).

In England, in most of the British Colonies, and in several of the States of America, the obligation of the surety, when it is not constituted by an instrument under seal, is called a guarantee. In Scotland the contract is called a cautionary

(*c*) Pothier ad Pand. lib. 46, tit. 1, § 1.
(*d*) Pothier, Tr. des Oblig. part 2, chap. 6, § 1, n. 366.
(*e*) Code Civil, Art. 1011.
(*f*) Las Siete Partidas, part 5, tit. 12, l. 1.

obligation, and the surety is called a cautioner. When it is given in a looser or epistolary form, it is called a letter of guarantee or credit.

This definition which has been given distinguishes the fidejussor from the mandator,—the former was constituted by stipulation only, the latter by mere consent, expressed *per nutum*, or even *per epistolam*. The mandator was constituted previously to the contract; the fidejussor was constituted after, as well as before the contract.

It distinguishes the fidejussor from the principal debtor, or a joint debtor, because the former undertook for the debt or obligation of another, and is collaterally liable, whilst the latter are the principals. As the principal obligation for which the surety is given is still retained in full force, and the principal debtor continues liable, the obligation of surety is distinguished from *novation*, by which the original obligation is extinguished (*g*).

As the obligation of surety is accessary to an obligation contracted by another person, there must be a principal subsisting obligation either previously or cotemporaneously, or subsequently contracted (*h*).

"Fide jussor obligari non potest ei apud quem reus promittendi obligatus non est (*i*). Si quis, postquam tempore transacto liberatus est, fidejussorem dederit, fidejussor non tenetur: quoniam erroris fidejussio nulla est" (*j*). Fide jussor et præcedere obligationem et sequi potest (*k*).

It was not necessary that the obligation should have been already contracted at the time the surety is given. "Adhiberi

(*g*) Lauterbach, lib. 46, tit. 1, n. 3. Mantica de tacit et Ambig. Convent. lib. 16, tit. 1.

(*h*) Mantica de tacit et Ambig. Convent. lib. 16, tit. 5, n. 3.

(*i*) Dig. lib. 46, tit. 1, l. 16.

(*j*) Ibid. l. 37.

(*k*) Ibid. l. 29. Inst. lib. 3, tit. 21, § 3.

autem fidejussor tam futuræ, quam præcedenti obligationi potest dummodo sit aliqua vel naturalis futura obligatio" (*l*).

As it is an accessary obligation, it must necessarily relate to the same subject as the principal obligation. " Quia in aliam rem, quam quæ credita est, fidejussor obligari non potest: quia non ut æstimatio rerum, quæ mercis numero habentur, in pecunia numerata fieri potest, ita pecunia quoque merce æstimanda est" (*m*)

It must not be of a greater extent, or more onerous, either in its amount, or in the time or manner, or place of performance. "Fidejussores ita obligari non possunt, ut plus debeant, quam debet is, pro quo obligatur. Nam eorum obligatio, accessio est principalis obligationis: nec plus in accessione potest esse, quam in principali re" (*n*). " Illud commune est in universis, qui pro aliis obligantur, quod si fuerint in duriorem causam adhibiti, placuit *eos omnino non* obligari" (*o*).

" Qui certo loco dari promisit, aliquatenus duriori conditioni obligatur, quam si pure interrogatus fuisset: nullo enim loco alio, quam in quem promisit, solvere invito stipulatore potest. Quare si reum pure interrogavero, et fidejussorem cum adjectione loci accepero, non obligabitur fidejussor" (*p*). " Sed et si reus Romæ constitutus, Capuæ dari promiserit, fidejussor Ephesi: perinde non obligabitur fidejussor, ac si reus sub conditione promisisset, fidejussor autem in diem certam vel pure promisisset" (*q*).

The text of the Civil Law rendered the obligation of the surety wholly void, if it exceeded the debt or the principal

(*l*) Dig. lib. 46, tit. 1, l. 6, § 2.
(*m*) Ibid. l. 42.
(*n*) Inst. lib. 3, tit. 21, s. 5.
(*o*) Dig. lib. 46, tit. 1, l. 8, § 7.
(*p*) Ibid. l. 16, § 1.
(*q*) Ibid. § 2.

amount, or if it contained conditions more onerous than those to which the latter were subject. The transposition, "omnino non," to "non omnino," has been condemned as untenable (*r*). But this subtle strictness of the Civil Law has been rejected by all the codes of Europe. The obligation is valid so as to subject the surety to the same liability as the principal debtor, and is void only for its excess (*s*).

But the obligation of the surety might be less onerous, both in its amount and in the time, place, and manner of its performance than that of the principal debtor.

"In leviorem plane causam accipi possunt. Propter quod in minorem summam recte fidejussor accipietur. Item accepto reo pure, ipse ex die vel sub conditione accipi potest: enimvero si reus sub conditione sit acceptus, fidejussor pure: non obligabitur" (*t*). It may be for a less amount, or the time of payment may be more protracted.

But although the obligation of the surety cannot in any of these respects be more extensive or onerous than that of the principal debtor, yet the remedy for enforcing it may be more extensive than that which the creditor could have adopted against the debtor. Thus the performance by the surety of his obligation may be secured by a mortgage, judgment, or

(*r*) Wissenb. ad Pand. Disp. 27, lib. 46, § 10.

(*s*) Hering. de Fidejuss. lib. 24, p. 52. Gomez, 2, Resol. 13, n. 2. Duaren. ad hunc. tit. c. 3. Wissenb. ad h. t. § 10. Vasq. 1 illust. Quæst. 40. Hering. de Fidejus. c. 24, n. 52. Tulden ad h. t. c. 3. Vinnius ad Inst. lib. 3, tit. 21, § 5. Voet, lib. 46, tit. 1, § 4. Zoes. ad h. t. n. 8, 9, 10, 11, 12. Perez. ad Code. Groeneweg. lib. 8, tit. 41. Lauterbach, Disp. 82, § 15. Partida, 5, tit. 2, l. 5. Rodenb. de jure conjug. ad Cod. lib. 8, tit. 40. Poth. Tr. des. Oblig. part 2, c. 6, n. 376. Code Civil, Art. 2013. Louisiana Code, Art. 3006. Erskine, b. 3, tit. 3, § 64-5. Lady Charteris, June 14, 1649, 1 Brown's Sup. 387. Ewing, Feb. 25, 1681, 3 Brown's Sup. 398. Booth, May 16, 1823, 2 S. & D. 211. Bell's Principles, 69. Lord Arlington *v.* Merricke, 2 Saund. 403, 411. Fell on Guaranties, 91.

(*t*) Dig. lib. 46, tit. 1, l. 8, § 7.

penalty (*u*), whilst the principal debt rested on the personal security of the debtor.

From the preceding definition, and from the very nature of the obligation of the surety, there must necessarily be an obligation on the part of him for whom the surety undertakes. If there be no obligation, the surety is not bound. "Cum causa principalis non consistit, ne ea quidem quæ sequuntur locum habent"(*v*). The obligation must not be contra bonos mores, nor prohibited by law, nor must its performance by the principal be impossible (*w*). Thus, in those countries where the S. C. Velleianum prevails, by which a woman is, except in certain cases, prohibited from giving a surety, "ne pro ullo fæminæ intercedant," the obligation which the surety has contracted for her is void (*x*).

So where the S. C. Marcellianum exists, the obligation of the surety to repay the loan prohibited by that law is void (*y*).

When the principal contract is absolutely void, as the contract of a married woman, by the law of Holland, the obligation of the surety is void (*z*). But if the person undertaking as surety knows that the contract of the principal debtor is void, on account of his incapacity, he must be

(*u*) Dig. lib. 46, tit. 1, l. 59. Vinnius in Inst. lib. 3, tit. 21, § 5. Gomez. 2. Resol. 23, n. 2. Mantica de tacit et Ambig. Convent. lib. 16, tit. 9, n. 9, 10. Ersk. b. 3, tit. 3, § 64. Crichton, Dec. 1612, Dict. 2074. Hepburn, Feb. 7, 1700, ib. 2076. Shaw, Nov. 28, 1623, ib. 2074. Taylor, Feb. 11, 1748, ib. 16813. Bell's Princ. p. 69.

(*v*) Dig. lib. 50, tit. 17, l. 178.

(*w*) Lauterb. lib. 46, tit. 1, § 18. Dig. ib. l. 29, l. 46, l. 56. Voet. ad h. tit. n. 11. Pothier, Tr. des Oblig. n. 367. Code Civil, Art. 2012, part 5, tit. 12, l.

(*x*) Dig. lib. 16, tit. 1, l. 16, § 1. Cod. lib. 4, tit. 29, l. 14. Voet. ib. 46, tit. 1, n. 9.

(*y*) Dig. lib. 46, tit. 6, l. 9, § 3. Voet. ib.

(*z*) Voet. ib. n. 10. Poth. Tr. des. Oblig. n. 396. But see Domat. liv. 3, tit. 4, s. 1, n. 3.

considered as incurring a principal and not merely a collateral obligation. He undertakes to secure payment to the creditor, notwithstanding the minority or coverture of the debtor might protect him from payment (*a*). Again, although no action can be sustained against the principal, yet the surety may be liable. Thus the surety for the performance of an obligation called natural, as distinguished from a civil obligation, will be bound, although no action could be maintained against the principal; of this description is the contract of a minor, made without the authority of his guardian, a demand which, although it could not have been sued for, yet having been once paid, cannot be recovered back (*b*). Omni obligationi fidejussor accedere potest (*c*).

Et generaliter, omnium, obligationum fidejussorem accipi, nemini dubium est (*d*).

" Fidejussor accipi potest quoties est aliqua obligatio civilis vel naturalis cui applicetur", (*e*).

Et naturales obligationes, non eo solo æstimantur si actio aliqua eorum nomine competit: verum etiam quum soluta pecunia repeti non potest. Nam licet minus proprie *debere* dicantur naturales, per abusionem tamen intelligi possunt debitores; et qui ab his pecuniam recipiunt, *debitum* sibi recepisse (*f*).

Quod enim solutum repeti non potest, conveniens est hujus naturalis obligationis fidejussorem accipi posse (*g*).

(*a*) 2 Lord Raym. 1066, Buchmyes *v.* Darnall. Harris *v.* Huntback, 1 Burr. 373. Stair's Inst. b. 1, tit. 17, § 11, n. Ersk. b. 3, tit. 3, § 64. Domat, liv. 3, tit. 4, s. 1, n. 10. Code Civil, Art. 2012, 2036.

(*b*) Voet. ib. n. 11.

(*c*) Dig. lib. 46, tit. 1, l. 1.

(*d*) Ibid. l. 8, 6.

(*e*) Ibid. l. 16, § 3.

(*f*) Ibid. l. 16, § 4.

(*g*) Ibid. l. 7.

Pro eo etiam qui jure honoraria, obligatus est, posse fidejussorem accipi sciendum est (*h*).

These principles are adopted by the law of Scotland (*i*).

The cautioner in a bond is responsible, although the principal, as a minor, was not bound (*j*).

Suspension of a charge on a bond against Brown, as cautioner for Hepburn, who had gone to England. Reason of suspension:—That the principal defender is not bound, the bond being subscribed only by one witness, and so there can be no relief to the suspender. Answer:—This is only a statutory nullity, and the principal is bound by natural obligation, which, though imperfect, is sufficient to sustain the cautioner's accessary obligation. The cautioner was held liable (*k*).

Cautioner signing as such to an account of merchant's goods, furnished to a married woman, was held bound, although the woman was not bound, and the cautioner had no relief against her (*l*).

Bond by a principal and cautioner sustained, the testing clause bearing thus:—"I have written and subscribed these presents before these witnesses," &c. (*m*).

Action against the heir of a cautioner on a bond of 130*l*. Defence:—The principal subscribed only by one notary. Answer:—The cautioner is bound as full debtor, jointly and severally. The defence was repelled (*n*).

Reduction of a bond of caution on a supply, on the ground

(*h*) Dig. l. 8, § 2. Poth. Pand. lib. 46, tit. 1, § 1.
(*i*) Bell's Princ. Law of Scotland, 177.
(*j*) Ewing *v.* Mallock, Feb. 25, 1681, Fount.
(*k*) Nimmo (Hepburn) *v.* Brown, Feb. 2, 1700, Fount. Dict. 2076.
(*l*) Shaw *v.* M'Farlan, Nov. 28, 1623, Durio. 83.
(*m*) Taylor *v.* Lord Braco, Feb. 11, 1748, Kilk. Dict. 16, 313.
(*n*) Johnston *v.* Laird of Romanno, Feb. 8, 1680, Stair.

of nullity as to the principal, the witnesses to whose subscription had not been assigned. Held null as to the cautioners, though the principal had acted as collector, and so was liable for his intromissions (*o*).

These cases may be reconciled, on the ground that wherever the cautioner engages, aware of the objection, he is bound personali exceptione from the plea; when the bond has been negligently and ineffectually executed to bind the principal, and taken by the creditor, the cautioner will not be liable (*p*).

It is not necessary that such obligation should have been contracted at the time he became surety, because he may engage as a surety for the payment by the principal of any debt, or the performance by him of any act which he may undertake to pay or to perform at any future period. The texts already cited establish this rule (*q*). But it is expressly laid down, "Adhiberi fidejussor tam futuræ quam præcedenti obligationi potest; dummodo sit aliqua, vel naturalis futura obligatio (*r*).

The obligation for which the surety is given may be to perform some act, as the building of a house (*s*);—that another shall account or perform a certain service (*t*).

The surety may bind himself not only for a present and certain amount, but for a debt of an indefinite or uncertain amount thereafter to be contracted by the principal. "Si ita stipulatus à Seio fuero, quantam pecuniam Titio quandoque credidero, dare spondes? et fidejussores accepero, deinde

(*o*) Innes *v.* Commissioners of Supply, Feb. 8, 1728, Dict. 2079.

(*p*) Bell's Princ. Law of Scotland, 177. Crichton, Dec. 1612, Had. Dict. 2074.

(*q*) Ibid. l. 7. Ibid. l. 16, § 3. Pothier, Pand. lib. 46, tit. 1, Art. 2, n. 8.

(*r*) Dig. lib. 46, tit. 1, l. 6.

(*s*) Ibid. lib. 46, tit. 1, l. 44.

(*t*) Ibid. lib. 38, tit. 1, l. 8, § 1. Munoz d'Escob. de Ratio. c. 34, 38.

Titio sæpius credidero: nempe Seius in omnes summas obligatus est, et per hoc fidejussores quoque: et id quod ex bonis ejus servari potest, omnibus æquo jure proficere debet" (*v*). He may be surety to repay such advances as A. may make to B.

The obligation of surety may be contracted by all persons who are not by law incapacitated from entering into obligatory contracts.

Women were prohibited by the S. C. Velleianum from becoming sureties. This prohibition is retained as the law of British Guiana, Spain, and Louisiana (*w*).

In France this law was abrogated by Henry IV. in the edict of 1606, but there were some provinces in which this edict was not registered; and there and in Normandy it continued until it was abolished by the promulgation of the Code Civil (*x*).

When, therefore, the principal obligation is void, in consequence of the obligor being by law incapable of contracting, the liability of the person undertaking as surety depends on his *knowing* that the principal was incapable. If, with that knowledge, he engages to pay the debt, his engagement assumes the character of an original obligation, and not that of surety. In fact he undertakes for the payment, notwithstanding the debtor might be able to resist it by alleging his incapacity. The Code Civil, in express terms, limits the exceptions which may be opposed by the surety to those which are inherent in the debt, and does not permit him to

(*v*) Dig. lib. 46, tit. 1, l. 55. Voet. lib. 46, tit. 1, n. 8. Mantica de tacit et Ambig. Convent. lib. 16, tit. 1, n. 15.

(*w*) Hering. de Fidejuss. l. 7, n. 389, *et seq.* Voet. lib. 16, tit. 1. Grotius Manud ad Jurisp. Holl. lib. 3, c. 3, n. 18, 19, 20. Partidas, b. 2, tit. 12, part 5. Beauregard *v.* Purnas and Wife, 1 Martin's Rep. 295. La Croix *v.* Coquet, 5 N. S. 527.

(*x*) Art. 7, Loi 30, Vent. An. 12. Code Civil, Art. 1123, 1128.

oppose those personal to the principal debtor (*y*). The same provision is adopted in the Louisiana Code (*z*).

The surety may be given for a vacant succession. "Mortuo reo promittendi, et ante aditam hereditatem fidejussor accipi potest: quia hereditas personæ vice fungitur, sicuti municipium, et curia, et societas" (*a*).

The law of England is distinguished from the preceding systems of jurisprudence in requiring, as essential to the validity of the contract of suretyship, when it is not expressed by a writing under seal, that it should be made upon a good and sufficient consideration; although, when that writing is under seal, no such consideration is required (*b*).

If in the former case there be any consideration, the Court will not weigh the extent of it. Any act of the party to whom the promise is made, from which the party in whose favour it is made derives a benefit or advantage, or from which the former sustains any labour, detriment, or inconvenience, or incurs any liability, or is exposed to any loss, or suspension or forbearance of any right, is a sufficient consideration (*c*).

It is not, however, required that the party promising should derive any benefit (*d*).

(*y*) Code Civil, Art. 2012, 2036. Baldwin *v.* Gordon, 12 Martin's Rep. 378. Poth. Tr. des Oblig. Lecher *v.* Scott, 10 Louis. Rep. 416.

(*z*) Louisiana Code, Art. 3005, 3029.

(*a*) Dig. lib. 46, tit. 1, l. 22. Hering. de fidejuss. s. 10, n. 31.

(*b*) Rann *v.* Hughes, 7 Bro. P. C. 556. 7 T. R. 350, n. (*a*). Pillans *v.* Van Meerop, 3 Burr. 1663.

(*c*) Phillips *v.* Bateman, 16 East, 356, per Lord Ellenborough. Pillans *v.* Van Meerop, 3 Burr. 1663. Rann *v.* Hughes, 7 Bro. P. C. 556. Stone *v.* Withepoole, Ow. 94. Sanders *v.* Jones, ib. 133. Copper *v.* Dickinson, 3 Bulst. 70. Cotton *v.* Westock, 3 Bulst. 187. Nerot *v.* Wallace, 3 T. R. 17, per Buller, J. Jones *v.* Ashburnham, 4 East. Rep. 455. Smith *v.* Algar, 1 B. & Ad. 603. Lilley *v.* Hewitt, 11 Price, 494. Longridge *v.* Dorville, 5 B. & Ald. 117.

(*d*) Freeman *v.* Freeman, 2 Bulst. 269. Bailey *v.* Croft, 4 Taunt. 611. Barber *v.* Fox, 2 Saund. Rep. 136.

The forbearance, in order that it may be a sufficient consideration for the promise, must be for a definite or certain time (*e*), or for a considerable (*f*), or reasonable (*g*), or convenient time (*h*).

An agreement to forbear for an indefinite period (*i*), or for a short (*j*), or some (*k*), or a little time (*l*), will not be a sufficient consideration.

The forbearance must be of some right which can be enforced with effect against the party forborne. If it cannot be so enforced by the party forbearing, he has sustained no detriment, and the party forborne has derived no benefit (*m*).

The party promising to forbear his right may be incapable of enforcing it, either because it had no existence, or the party forborne, in whose favour the promise was made, may not have been liable to be sued (*n*).

But it is not necessary that either the right of the party forbearing, or the liability of the party forborne, should be co-extensive with the promise. Thus, where a plaintiff was about to issue an execution for 107*l.*, for his debt of 60*l.* and the costs, having a right to levy only for the 60*l.*, forbearance by him, at the request of the defendant, to enforce the writ, is

(*e*) Reynolds *v.* Prosser, Hard. 71. Trickett *v.* Mandlee, 1 Sid. 45. S. C. 1 Keb. 114.

(*f*) Mapes *v.* Sidney, Cro. Jac. 683.

(*g*) Lengen *v.* Broughton, 3 Bulst. 206.

(*h*) Trickett *v.* Mandlee, 1 Sid. 45. Sadler *v.* Hawkes, Roll. Ab. 27, pl. 49.

(*i*) Phillips *v.* Sackford, Cro. Eliz. 455.

(*j*) Tolhurst *v.* Brickenden, Cro. Jac. 250.

(*k*) Trickett *v.* Mandlee, 1 Sid. 45.

(*l*) Ibid. 1 Roll. Ab. 23.

(*m*) Jones *v.* Ashburnham, 4 East's Rep. 455. Nerot *v.* Wallace, 3 T. R. 17. Longridge *v.* Dorville, 5 B. & Ald. 123, per Bailey, J.

(*n*) Tooley *v.* Wilbraham, Cro. Eliz. 206. King *v.* Hobbes, Yelv. 25. Lloyd *v.* Lee, St. 94. Atherson *v.* Selben, Willes, 482. Jones *v.* Ashburnham, 4 East's Rep. 455.

a sufficient consideration for a promise by the defendant to pay the 107*l.* in seven days (*o*).

Neither is it necessary that the right of the party forbearing should be certain and clear, and free from doubt. Thus where a suit was instituted to enforce a claim on the validity of which there had been contradictory decisions, and the law was doubtful whether the plaintiff would be entitled to recover, the relinquishment of that suit, and the delivery of the property, the subject of that suit, to the party sued, at the request of another, is a sufficient consideration for a promise by the latter to pay a stipulated sum to the party relinquishing such suit (*p*).

Thus although no action could be maintained on a promise, the consideration of which was the surrender of a lease at will, for the lessor might determine it, yet if there was *a doubt* whether it was a lease at will or for years it would be otherwise (*q*).

The sufficiency or insufficiency of the consideration will be affected by the question whether, before the promise is made, the act or service has already been done or performed by the party to whom the promise is given, and has been done or performed, without any previous request, by the party making it, in which case the contract is termed *executed;* or whether the act or service is to be done or performed subsequently to the giving of the promise, and the same has been done or performed, in which latter case the consideration is termed *executory.* Thus, where a party was in a shop buying goods, and *after* he had bought, a third person then being present, says to the seller, "If he do not pay you I will," there is no sufficient consideration for such a promise (*r*). The creditor neither sustains nor incurs any detriment or inconvenience,

(*o*) Smith *v.* Algar, 1 B. & Ad. 605.
(*p*) Longridge *v.* Dorville, 5 Barn. & Ald. 123.
(*q*) Com. Dig. Action on the case, Assumpsit, F. 8.
(*r*) Thorner *v.* Field, 1 Bulstr. 125.

nor does the debtor derive any benefit from the promise made by the third party. Again, the servant of A. having been arrested in London for a trespass, I. S., the friend of A., bailed him, and A. *afterwards* promised to save I. S. harmless, and I. S. having been compelled to pay the condemnation money, it was held, that an action did not lie upon A.'s promise, because the bailing, which was the consideration, was past and executed before (*s*).

A consideration, therefore, which is executed, is not sufficient to support a subsequent promise, unless, indeed, the act or service was done at the request of the party promising; in that case the request precedes and induces the act or service, and the promise becomes connected with it (*t*).

A debt being due from A. to B., a promise by S. to pay the debt if the debtor fail to pay, provided the creditor will give the debtor time for payment, and will not take legal measures to recover the debt, and the creditor consents to these terms, and forbears for a reasonable, certain, or definite period, there will be a sufficient consideration for this promise by the surety; here the creditor is exposed to injurious consequences, and the debtor derives a benefit from the forbearance (*u*).

When the consideration is *executory*, that is, when the promise precedes and induces the act or service, and the act or service is done, as where L. guarantees the payment of any goods which S. *shall* deliver to N., and S. does deliver goods to N., here there is a sufficient consideration for the promise, and L. is answerable (*v*).

(*s*) Hunt *v.* Bate, 3 Dy. 272 (*a*).

(*t*) Sidenham *v.* Wortington, 2 Leon. 224, pl. 286. S. C. Cro. Eliz. 42. Craske *v.* Johnson, 2 Buls. 74. Com. Dig. Action on the case upon assumpsit, B. 12. Payne *v.* Wilson, 7 B. & C. 423. Emmott *v.* Kearns, 5 Bing. N. C. 559.

(*u*) Sadler *v.* Hawkes, 1 Roll. Ab. 27, pl. 49. Smith *v.* Algar, 1 B. & Ad. 603.

(*v*) Stadt *v.* Lill, 9 East's Rep. 348. Newbury *v.* Armstrong, 2 Bing.

This doctrine of the law of England prevails in all the colonies of Great Britain, except those of British Guiana, Trinidad, St. Lucia, the Cape of Good Hope, the island of Mauritius. It is adopted by all the States of America except Louisiana (*w*).

It has been seen that it is in respect only of writings not under seal that the law of England required a sufficient consideration. But by the revised statutes of New York, vol. 2, p. 406, ss. 77, 78, it is declared, that a seal is only presumptive evidence of a sufficient consideration, and liable to be rebutted equally as if the instrument was not sealed, provided such a defence be made by plea or by notice under the general issue. This statute provision was an innovation upon the common law rule (*x*).

In Indiana, by statute, (Revised Statutes, 1838, p. 457,) the considerations of specialties and other contracts (conveyances of real estate and negociable paper excepted) may be inquired into under special pleas, or given in evidence on a trial at law.

201. Russell *v.* Mosely, 3 B. & B. 211. Combe *v.* Wolff, 8 Bingh. 157. Ex parte Gardom, 15 Vez. 287. Ryde *v.* Curtis, 8 D. & R. 62. Shortrede *v.* Cheek, 1 Ad. & Ell. 59.

(*w*) Burnet *v.* Bisco, 4 John's Rep. 235. Thacher *v.* Densmore, 5 Mass. Rep. 301. Horner *v.* Hollenbeck, 2 Day's Rep. 22. Cook *v.* Bradley, 7 Conn. Rep. 57. Brown *v.* Adams, 1 Stewart's Alab. Rep. 51. Beverleys *v.* Holmes, 4 Munf. Rep. 95. Parker *v.* Carlin, ib. 273. Lent *v.* Padleford, 10 Mass. Rep. 236. Seaman *v.* Seaman, 12 Wendell's Rep. 331. Livingston *v.* Rogers, 1 Caine's Rep. 584. Comslock *v.* Smith, 7 John's Rep. 87. Hicks *v.* Burhans, 10 John's Rep. 243. Garrett *v.* Stuart, 1 M'Cord's S. C. Rep. 514. Trimble *v.* Green, 3 Dance's Rep. 356, 357. 2 Kent's Com. 463, *et seq.* Dale *v.* Roosevelt, 9 Cowen's Rep. 307.

(*x*) Case *v.* Broughton, 11 Windell's Rep. 106.

CHAPTER II.

OF THE MANNER AND FORM IN WHICH IT IS CONSTITUTED.

In what manner constituted.—The Civil Law.—Law of Germany; Holland; France; Spain; Law of England.—Fourth Section of Statute of Frauds requires writing.—What promises are within it.—Collateral and not original.—Debt, default or miscarriage of another person than the party promising.—The liability of the person on whose account the promise made.—When his liability has ceased.—What memorandum in writing is sufficient to satisfy this requisition.—What ought to be stated.—Signature, in what manner.—By whom: partner; agent; infant.—Law in British Colonies.—In the States of America.

THE contract of surety or guarantee, like every other contract, requires the consent of the party to whom, as well as that of the person by whom the promise is given. Hence, if the instrument does not express an absolute engagement, but a proposal or offer to guarantee, the contract is not complete until the party to whom the proposal is made has signified his acceptance of it. "Pactum est duorum consensus atque conventio. Pollicitatio vero offerentis solius Promissum" (*a*). "Tamen pollicitatio, quæ initio inspecto pactum non est, pacti naturam induere videatur, ex quo per eum, cui facta, accepta fuerit" (*b*).

This acceptance of the proposal, and, consequently, the assent of the party to the contract, may be subsequently given. "Labeo ait convenire posse vel re, vel per epistolam, vel per nuncium inter absentes quoque posse" (*c*).

"Sed etiam tacite, consensu convenire intelligitur" (*d*).

(*a*) Dig. lib. 50, tit. 12, l. 3.
(*b*) Voet. lib. 50, tit. 12, n. 1.
(*c*) Dig. lib. 2, tit. 14, l. 2.
(*d*) Ibid. l. 2.

"Hæ autem tacitæ conventiones ex variis factis colligi possunt" (*e*).

If a person give an absolute guarantee, as, "I guarantee the payment of any goods which A. B. delivers to C. D.," the party to whom it is given may act on it without further communication (*f*). But if the undertaking be rather in the nature of a proposition or offer to give the guarantee, the person to whom the proposition is made must communicate his assent to the person making it (*g*), or there must be some proof given that the person making such proposition had subsequently consented to its being conclusive as a guarantee (*h*). If the proposition is made subject to any terms or conditions, a strict compliance in every respect with the terms and conditions contained in such proposition is necessary to make it binding (*i*).

The acceptance, and notice of such acceptance, would be requisite in the following cases:—

"Messrs M'L. & Co.

"Gentlemen. As I understand Messrs. D. Anderson and Co., of Quebec, have given you an order for rigging, &c., which will amount to about 4000*l.*, I can assure you, from what I know of D. A.'s honour and probity, you will be perfectly safe in the crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit" (*j*).

(*e*) Pothier ad Pand. lib. 2, tit. 14, l. 4, n. xvi.

(*f*) Oxley *v.* Young, 2 H. Bl. 613; 1 Esp. 424. Stadt *v.* Lill, 9 East, 348. Hargrave *v.* Smee, 6 Bing. 244.

(*g*) M'Iver *v.* Richardson, 1 M. & S. 557. Symmons *v.* Want, 2 Stark. 371. Mozley *v.* Tinckler, 1 C., M. & R. 692.

(*h*) M'Iver *v.* Richardson, ib.

(*i*) Gaunt *v.* Hill, 1 Stark. 10; and see Payne *v.* Ives, 3 Dowl. & Ry. 664.

(*j*) M'Iver *v.* Richardson, 1 M. & S. 557.

"Sir,

"I have no objection to guarantee the payment of rent, as far as that of each quarter, during Mr. T. Want's continuance in possession, but you must see that no arrears of rent accrue" (*k*).

"Doncaster, July 5, 1833.

"Gentlemen,

"Mr. France informs me that you are about publishing an Arithmetic for him and another person, and I have no objection to being answerable as far as 50*l.* For any reference apply to Messrs. Brooke & Co. of this place.

"I am, Gentlemen,

"Your most obedient Servant,

"GEORGE TINCKLER.

"Witness to Mr. Tinckler,

"J. BROOKE" (*l*).

Each of these writings was held to be only a proposal to guarantee, and that the party to whom it was made, if he intended to accept, ought to have communicated such intention to the party making it.

By the civil law this obligation could be constituted only by stipulation, that is, by words which expressly imported it. It could not be constituted by mere consent *nudus consensus*. "Sine verbis autem, sed literis solis inter absentes, vel per nuncium, vel nutu, vel facto, aliisve signis voluntatem declarantibus de jure civili fieri non potest" (*m*); but no particular expressions were required. It was sufficient that they imported an assent to the creditor's interrogation, whether the party would undertake for the debtor. "Et novo Justiniani jure quælibet verba ad fidejussionem con-

(*k*) Symmons *v.* Want, 2 Stark. 371.
(*l*) Mozley *v.* Tinckler, Cr., M. & Ros. 692.
(*m*) Lauterbach, vol. 3, lib. 46, tit. 1, n. 9, p. 696.

trahendam sufficiunt; ut, si quis interroganti: Centum, quæ Titius mihi debet, fide tua esse jubes? responderit: Fidejubeo, Spondeo, Volo, Cupio, Affirmo, Dico, Præsto, Periculo meo crede; item: Quidni, vel Omnimodo" (*n*).

It should be added, that an acknowledgment in writing *se fidejussisse* was treated as evidence that the interrogation to which it is deemed an answer had preceded it (*o*).

No such form was essential to the constitution of this obligation either in Germany, or by the law of Holland before the promulgation of the Code Civil, and therefore in the colonies of British Guiana and the Cape of Good Hope, it might be contracted in the same manner as any other species of obligation (*p*). But in Ceylon the contract must be in writing (*q*).

Neither was this form adopted in France. The obligation was contracted by a simple agreement, either by an act before notaries, or *sous signature privée*, or even verbally, but if the subject of the obligation exceeded 100 livres, there must be witnesses, and a verbal agreement was not admissible.

The Code Civil admits of its constitution by a simple agreement in writing, either by an *acte* passed before notaries, or *sous signature privée*, and when the sum does not exceed 150 francs, by a verbal agreement proveable by witnesses (*r*).

By the law of Spain the obligation may be contracted verbally (*s*).

The statute law of England requires, that the agreement

(*n*) Lauterb. vol. 3, lib. 16, tit. 1, n. 9, p. 695. Dig. lib. 46, tit. 1, l. 8. Cod. lib. 8, tit. 41, l. 12.

(*o*) Inst. lib. 3, tit. 21, § 8.

(*p*) Lauterb. lib. 46, tit. 1, n. 10. Stryk. in Usu. Modern., cited ib. Voet. lib. 46, tit. 1, n. 1.

(*q*) See the Ceylon Ordinance of 1840.

(*r*) Pothier, Tr. des Oblig. part 2, c. 6, § 4, n. 400. Code Civil, Art. 1341.

(*s*) L. 6, tit. 12, p. 5, l. 1, 2, tit. 11, p. 5.

for the promise, or some memorandum or note thereof, should be in writing, and signed by the party to be charged, or by his agent lawfully authorized. The 4th section of the Statute of Frauds, 29 Car. 2, c. 3, enacts, that "no action shall be brought to charge the defendant upon any special promise to answer for *the debt, default, or miscarriage* of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." This section of the statute applies only to such special promises as are accessory or collateral to a debt or obligation, either previously, cotemporaneously, or subsequently contracted by another person.

It only applies to those promises which are collateral, or, in its own words, to promises for the debt, default, or miscarriage of a person other than of him giving the promise, that is, to contracts in which he is a surety, not to those in which, from there being no debt or obligation of the other, he, the person promising, is the principal debtor. The agreement must, therefore, be for the payment or performance of something for which another person is liable. If no other person be liable, it is not an agreement "to answer *for the debt, default, or miscarriage of another*" (*t*). Thus, a promise by A., in consideration that B. would not sue J. S., or would stay an action already commenced, or where judgment had been obtained, in consideration that he would stay proceedings, to pay B. the money due from J. S., is within the statute (*u*).

A tradesman being requested to supply A. with goods, agrees to do so upon B. promising to pay for them if A. do

(*t*) Castling *v.* Aubert, 2 East, 325. Edwards *v.* Kelly, 6 M. & S. 204. Kirkham *v.* Marter, 2 B. & Ald. 613.

(*u*) Fish *v.* Hutchinson, 2 Wils. 94. In re Greaves, 1 Crompt. & Jerv. 374, and Tomlinson *v.* Gell, 6 Ad. & Ell. 564.

not, and *subsequently* delivers the goods to A., this is a promise to pay the debt of another although the goods were not delivered, and consequently there was no debt at the time of B.'s promise. And although the contract between the tradesman and A., for supplying the latter with the goods, should have been made before B.'s promise, yet if the delivery of the goods was subsequent, it is equally within the statute, because until the delivery the sale was not complete (*v*).

The word *miscarriage*, used in the fourth section of the Statute of Frauds, has not the same meaning as the word "debt," or "default;" it comprehends that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages; and therefore falls within the meaning of the word "miscarriage."

The term *miscarriage* is more properly applicable to a ground of action founded upon a tort than to one founded upon a contract; for in this latter case, the ground of action is, that the party has not performed what he agreed to perform, not that he has misconducted himself in some matter for which by law he is liable. Both the words *miscarriage* and *default* apply to a promise to answer for another with respect to the non-performance of a duty, though not founded upon a contract (*w*).

The promise within the statute must be for the debt, default, or miscarriage of a person other than the person making the promise. It must be a collateral and not an original promise.

(*v*) Peckham *v.* Faria, 3 Dougl. 13. Jones *v.* Cooper, Cowp. 227. Matson *v.* Wharam, 2 T. R. 80. Langdale *v.* Parry, 2 Dowl. & Ry. 337. Mines *v.* Sculthorpe, 2 Camp. 215. Simmons *v.* Keating, 2 Stark. 426, Barber *v.* Fox, 1 Stark. 270.

(*w*) Kirkham *v.* Marter, 2 Barn. & Ald. 516.

The promise is not required to be in writing in those cases in which the credit is given to the person promising, and no credit is given to the party to whom the goods are delivered.

Thus, if A. introduces B. to C., a tradesman, and asks C. if he will supply B. with goods in the way of his trade, and that, if he will, he A. will be answerable, and C. agrees, and the order is given and the goods supplied accordingly, and C. enters the name of A. in his books as his debtor, and makes no application to, and never requires payment from B., but when the usual time of credit has expired, applies to A. for payment, the contract between A. and C. is an original contract and need not be in writing (*x*). And it is immaterial whether the person giving the promise receives any benefit from it or not (*y*).

If two come to a shop and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you I will," this is a collateral undertaking, and void, without writing, by the Statute of Frauds. But if he says, "Let him have the goods, I will be your paymaster, or, I will see you paid," this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant. In such a case the question is, to which of the two credit was given, and that is to be ascertained on a consideration of all the circumstances of the case (*z*).

But if the tradesman, where there has been any privity between him and the person to whom the goods have been furnished, give any credit whatever to such person (*a*), then

(*x*) See Simpson *v.* Penton, 2 Cr. & Mees. 430. Oldham *v.* Allen, 2 Cr. & Mees. 433, Cit. and Cases referred to.

(*y*) Simpson *v.* Penton, *supra*. Edge *v.* Frost, 4 Dowl. & Ry. 243.

(*z*) Birkmyr *v.* Darnell, 1 Salk. 27. Keate *v.* Temple, 1 Bos. & Pul. 158. Darnall *v.* Trott, 2 C. & P. 82. Storr *v.* Scott, 6 C. & P. 244.

(*a*) Matson *v.* Wharam, 2 T. R. 80. Mines *v.* Sculthorpe, 2 Camp. 215. Anderson *v.* Hayman, 1 H. Blk. 120; and see Rains *v.* Story, 3 Car. & P. 130. Barber *v.* Fox, 1 Stark. 270; and the Observations of Holt,

the promise is collateral. And an application to him for payment (*a*), entering his name by the tradesman in his books as debtor (*b*), or making out the bill of parcels in the name of the person supplied (*c*), or, in case of his becoming bankrupt, proving the value of the goods furnished as a debt under the commission, have been considered as evidence of the credit having been given to such person.

Where goods have been supplied by C. to B., at the request of A., an entry in C.'s books as follows, "Mr. B., per Mr. A.," was not considered sufficient to make the promise as against A. collateral, no credit having been given to B. And in another case where C.'s foreman (C. being a tailor) had, in the absence of C. from home, sent certain wearing apparel, for which A. had promised to be liable, to B.'s house, but who, on C.'s return, prevailed upon B. to let him have them again, when they were again sent to B. at A.'s request, and upon another promise by him that he would pay for them, it was held not sufficient to make A.'s promise a collateral one (*d*).

The debt or default, for which the promise is required to be in writing, must be that of another person, and not of the person promising.

H. was employed to do work on certain houses, and the defendant was employed as surveyor over him, and he was to receive the monies to be paid to H. for such work. A promise

C. J., in Austin *v.* Baker, 12 Mod. 250; and of Bailey, B., in Simpson *v.* Penton, 2 Cr. & Mees. 430.

(*a*) Matson *v.* Wharam, *supra*, and see Rains *v.* Storry, *supra*.

(*b*) Jones *v.* Cooper, Cowp. 227. S. C. nom. Jones *v.* Cowper, Loft. 769. Oldham *v.* Allen, 2 Cr. & Mees. 433, citing Matson *v.* Wharam, 2 T. R. 80. Anderson *v.* Hayman, 1 H. Blk. 120; and see the Observations of Holt, C. J., in Austin *v.* Baker, 12 Mod. 250.

(*c*) Langdale *v.* Parry, 2 Dowl. & Ry. 337, and see Barber *v.* Fox, 1 Stark. 270.

(*d*) Langdale *v.* Parry, *supra*.

by the defendant, in consideration that the plaintiff would furnish H. with such materials as should be required to enable him to do the work, he, the defendant, would pay the plaintiff for such materials out of the monies received by him as might become due to H. for the work, is not a promise for the debt or default of another, and therefore need not be in writing (*e*).

A promise by a party to execute a bailbond on a writ to be sued out against A. B., in consideration of the plaintiff forbearing to arrest A. B., on a writ already sued out, is not a promise to answer for the debt of another under the statute (*f*).

An undertaking, that if plaintiff would discharge A. out of custody, defendant would pay the debt at all events, is not such a guarantee to pay the debt of another as is required to be in writing; but an undertaking, that if plaintiff would discharge A., and take his bill for the debt, defendant, without indorsing it, would pay in case A. dishonoured it, must be in writing (*ff*).

B. holding A.'s warrant of attorney for 340*l.*, signed judgment thereon, and sued out a fi. fa. A. having other creditors, his brother-in-law, C., looked into his accounts, and with the assent of B., and the rest of the creditors, had all A.'s property conveyed to him, upon his undertaking to pay A.'s creditors in full. B. relinquished his execution against A., but after waiting some years for payment of his debt, was eventually obliged to sue C. It was objected that the defendant's promise was to answer for the debt, default, or miscarriage of another, and should therefore have been in writing. But it was held, that it was an original promise, and not within the meaning of the Statute of Frauds (*g*).

The plaintiffs being owners of a ship hired on charter party

(*e*) Andrews *v.* Smith, 2 C., M. & R. 627.
(*f*) Jarman *v.* Algar, 2 C. & P. 249.
(*ff*) Maggs *v.* Amos, 4 Bing. 474.
(*g*) Bird *v.* Gammon, 3 Bing. N. C. 883.

by H. S., refused to let her sail till certain disputes about the freight, between them and H. S., were settled, H. S. giving security; whereupon the defendant, in consideration that the plaintiffs would let H. S. sail without giving security, undertook to procure P. M. to sign the particular guarantee, and deliver it to the plaintiffs within a week. It was decided that this was not an undertaking for the debt, default, or miscarriage of another within the Statute of Frauds (*g*).

The plaintiff, an occupier of land, at the request of the defendant, and upon a promise of indemnity against the costs, resisted a suit of the Vicar for tithes. The Vicar succeeded, and the plaintiff having paid the costs, brought his action against the defendant upon this promise of indemnity. It was decided that this was not a promise required by the Statute of Frauds to be in writing (*h*).

A. was indebted to B. and Co. for goods sold, and upon being released from his liability, he assigned to B. and Co. a debt which was due to him from C. and Co., and notice of the assignment was given to a partner, in the house of C. and Co., who, by parol, promised in the name of the firm to pay the debt to B. and Co., out of the partnership funds. It was held, in an action by B. and Co. against C. and Co., for money had and received, that the promise was not within the statute (*i*).

A. was indebted to B., and C., who resided abroad, was indebted to A. A. proposed to assign to B. the debt owing from C. to him, which B. agreed to accept. A. writes to C.'s agents in this country, "As soon as you have funds belonging to C., pay on my account to B. 291*l.* 19*s.*, and I will credit C., having received his order to that effect." C.'s agents verbally

(*g*) Bushell *v.* Bevan, 1 Bing. N. C. 103.
(*h*) Adams *v.* Dancey, 6 Bing. 506; 4 M. & P. 245.
(*i*) Lacy *v.* M'Neile, 4 D. & R. 7.

promise B. to pay him, as they have funds of C. in hand. A. afterwards orders C. to pay another creditor the debt owing from C. to A., and C. gives an undertaking to pay that creditor, with a memorandum, stating that as it was alleged that a payment had been made by some person to A. on account of C., it was declared that should C. prove such payment to have been made, the amount should be deducted. C. having refused to pay the debt to this latter creditor, on the ground that the agents were liable to pay it to B., it was held, that C.'s promise to pay was not a promise to pay the debt of a third person, and not within the statute (*j*).

A. being insolvent, a verbal agreement was entered into between several of his creditors and B., whereby B. agreed to pay the creditors ten shillings in the pound in satisfaction of their debts, which they agreed to accept, and to assign their debts to B. It was held, that this agreement was not within the statute, not being a collateral promise to pay the debt of another, but an original contract to purchase the debts (*k*).

The debt of another may have been the original cause of the promise, yet if the person to whom it is given relinquish some right or advantage which he possessed, and which might have enabled him to obtain satisfaction of his debt, the promise by a third party to pay the debt, in consideration of such relinquishment, is an original promise. Thus, the goods of an insolvent being about to be sold, and the landlord having entered and distrained for the rent in arrear, or having entered with an intent to distrain, if he is induced to give up the distress, or to refrain from distraining, in consequence of a promise by a third party to pay the landlord such rent as should appear to be due to him from the tenant, the promise is an original, and

(*j*) Hodgson *v.* Anderson, 5 D. & R. 735; 3 B. & C. 842.
(*k*) Anstey *v.* Marden, 1 N. R. 124; 2 Smith, 426.

not a collateral promise, and therefore not within the statute (*l*).

But the promise must not extend to that for which the goods were not answerable, as if the promise to the landlord was not only to pay him the rent that was due, but also the accruing and future rent; for the landlord had no power to distrain for the future rent, and the promise by such third person would, as to that future rent, be a promise to answer for the debt of another within the statute (*m*).

Where the sheriff had taken goods in execution upon a fieri facias, a promise to the officer by a third party to pay him the debt, in consideration that he would restore them, is an original promise not within the statute (*n*). So where a person promised the widow of an intestate that if she would allow his name to be joined with hers in the letters of administration of the intestate's estate, he would make good any deficiency to pay the debts of the intestate; or if A. sells goods to B., who being unable to pay for them, transfers them to C., and C., with the assent of A., promises A. to pay for them, whereby the debt of B. is extinguished, the promises are original, and not within the statute (*o*).

Where an insolvent about to leave the country, and in fear of an arrest from one of his creditors, another creditor undertook that if the insolvent would execute to him an assignment of all his property he would pay the debt of the creditor from whom he apprehended an arrest, in the first instance out of the proceeds, and apply the residue in satisfaction of his own demand, and the surplus, if any, to the insolvent; or where

(*l*) Edwards *v.* Kelly, 6 M. & S. 204. Stephens *v.* Pell, 2 Cr. & Mees. 710. Williams *v.* Leper, 3 Burr. 1886. Bampton *v.* Paulin, 4 Bing. 264.

(*m*) Thomas *v.* Williams, 10 B. & C. 664.

(*n*) Lowe's Case, Salk. 23.

(*o*) Tomlinson *v.* Gell, 6 Ad. & Ell. 564. Browning *v.* Stallard, 5 Taunt. 450. Hodgson *v.* Anderson, 3 B. & C. 842. Wilson *v.* Coupland, 5 B. & A. 228. Fairlee *v.* Denton, 8 B. & C. 395. Crawford *v.* Gurney, 9 Bing. 372.

the plaintiff, in an action, having issued execution against A., A., without the assent of the plaintiff, conveyed all his property to B., who thereupon undertook to pay the plaintiff the debt due from A., the plaintiff withdrawing the execution, the promises in both these instances were original, and not within the statute (*p*).

The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances, as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters, which was accordingly done, and the money was afterwards received by the defendant. It was held, that this was not a promise for the debt or default of another within the statute, and that the plaintiff might recover against the defendant, as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received (*q*).

A promise to pay out of the debtor's own funds is not within the statute. A promise to pay the creditor out of such monies as should come to his, the promiser's hands, on account of the debtor, is an original promise, and not within the statute (*r*).

Thus, where W. undertook to complete the carpenter's work in H.'s house, and find all the materials, but being in want of funds to procure timber, it was supplied by M., on a promise by H. to pay M. for such timber out of the money that he, H., should have to pay W. This was held to be an original, and not a collateral promise (*s*).

(*p*) Gregory *v.* Williams, 3 Mer. 582.

(*q*) Castling *v.* Aubert, 2 East, 325.

(*r*) Eastwood *v.* Kenyon, 11 Ad. & E. 438.

(*s*) Parkins *v.* Moravia, 1 Car. & P. 376. Andrews *v.* Smith, 2 Cr., M. & R. 627. Dixon *v.* Hatfield, 2 Bing. 439. S. C. 10 Moore, 42.

The person for whom the promise is given must be liable, as well as the person giving the promise, for otherwise it is an original and not a collateral promise, and therefore not within the Statute of Frauds. If, therefore, the person for whom the promise was given was exempt from all liability by reason of his infancy, the promise given is original and not collateral (*t*).

So where the person giving a promise has no authority or ability to bind or make liable the person for whom he promises, as where a solicitor makes an arrangement for the payment of costs, or whereby he pledges the credit of his client, for which he had no authority from his client, his promise is an original promise (*u*).

The party for whom the promise is made, although originally liable, may have ceased to be so by reason of that very act which was the consideration for the promise.

The defendant, in consideration that the plaintiff would discharge A. B., whom he had taken under a capias ad satisfaciendum, promised to pay A. B.'s debt. It was held unnecessary that the promise should be in writing, for the defendant's liability on his promise could not begin till the plaintiff had discharged A. B. out of custody, since that discharge was made a condition precedent; but the moment A. B. was discharged, *his* liability was at an end, so that the defendant was never liable for a debt of A. B.; the debt had ceased to be due from A. B. before the defendant became liable to pay it. The promise in this case is an original and not a collateral promise, and is supported by a sufficient consideration, because not only has A. B. derived a benefit, but the plaintiff has relinquished a right (*v*).

(*t*) Harris *v.* Huntbach, 1 Burr. 373.

(*u*) Iveson *v.* Conington, 1 B. & C. 160. Burrell *v.* Jones, 3 B. & Ald. 47. Thompson *v.* Bond, 1 Camp. 4.

(*v*) Goodman *v.* Chase, 1 B. & Ald. 297.

What is required to be in writing is the *agreement*, not the promise as mentioned in the first clause, or some note or memorandum of the agreement. Now the agreement is that which is to shew what each party is to do or perform, and by which both parties are to be bound, and this is required to be in writing. If it were only necessary to shew what one of them was to do, it would be sufficient to state the promise made by the defendant who was to be charged with it. But if this construction were to be adopted, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent, for, without the parol evidence, the defendant cannot be charged upon the written contract for want of a consideration in law to support it. The effect of the parol evidence then is, to make him liable; and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the agreement, by which must be understood the whole agreement, should be in writing (*w*).

It is sufficient if the consideration can be collected by a fair intendment from the whole tenor of the writing, not that a mere conjecture, however plausible, would be sufficient to satisfy the statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum (*x*).

(*w*) Wain *v.* Warlters, 5 East, 10. Saunders *v.* Wakefield, 4 B. & A. 596. See Jenkins *v.* Reynolds, 3 B. & B. 14. Morley *v.* Boothby, 3 Bing. 107. Whitcombe *v.* Lees, 5 Bing. 34. Cole *v.* Dyer, 1 C. & J. 461; 1 Tyrw. 307. Wood *v.* Benson, 2 Tyrw. 98. Bushell *v.* Beavan, 1 Bing. N. C. 103. Hawes *v.* Armstrong, ibid. 761. Ellis *v.* Levi, ibid. 767. James *v.* Williams, 5 B. & Ad. 1109. Clancy *v.* Piggott, 2 Ad. & Ell. 473. Raikes *v.* Todd, 8 Ad. & Ell. 646.

(*x*) See the judgment of Tindal, C. J., in Hawes *v.* Armstrong, and of Patteson, J., in James *v.* Williams, 5 B. & Ad. 1109.

When an agreement is in its nature *prospective*, such an inference is much more easily arrived at than when it is in its nature retrospective. Thus the following guarantee,—

"I guarantee the payment of any goods which Mr. John Stapp shall deliver to Mr. Nicholls, of Brick Lane,

"JOHN LILL."

was held sufficient (*y*).

A guarantee was expressed to be in consideration that the plaintiff "would withdraw the promissory note," was held to be sufficiently certain, and that parol evidence was admissible to shew what promissory note was meant (*z*).

Provided that the agreement be reduced to writing, according to the above rules, it matters not out of how many different papers it is to be collected, so long as they can be sufficiently connected in sense. But this connection in sense must appear upon the documents themselves, for parol evidence is not admissible for the purpose of connecting them.

The amount of the debt guaranteed need not be stated, nor the name of the creditor for whom the surety intended his indemnity for the amount of the debt, and the name of the creditor may be supplied by oral testimony (*a*).

And it is not essential to *the validity of the writing* that it should shew mutuality. It is sufficient if the party sued is shown to be liable (*b*).

(*y*) Stapp *v.* Lill, 1 Camp. 242; 9 East, 348.

(*z*) See Newbury *v.* Armstrong, 6 Bing. 206. Russell *v.* Mosely, 3 B. & B. 211. Morris *v.* Stacey, Holt. N. P. C. 153. Ryde *v.* Curtis, 8 D. & R. 62. Ex parte Gordon, 15 Ves. 287. Coombe *v.* Woolff, 8 Bing. 157. Shortrede *v.* Cheek, 1 Ad. & E. 59. Jackson *v.* Lowe, 1 Bing. 9. Phillimore *v.* Barry, 1 Camp. 513. Saunderson *v.* Jackson, 2 B. & P. 238. Allen *v.* Bennett, 3 Taunt. 169. Dobell *v.* Hutchinson, 3 Ad. & Ell. 355. Boydell *v.* Drummond, 11 East, 142.

(*a*) Bateman *v.* Phillips, 15 East's Rep. 272.

(*b*) Stapp *v.* Lill, 1 Camp. 262. Newbury *v.* Armstrong, 6 Bing. 201. S. C. 4 Car. & P. 59. S. C. 3 Moo. & P. 509. S. C. Mood. & M. 389; and see the Observations of Parke, B., in Mozley *v.* Tinkler, 1 Cr., M. & Ros. 692; and of Patteson, J., in Morton *v.* Burn, 2 Ad. & Ell. 19.

Nor need the writing (if it disclose the real substance of the cause of action, and render it unnecessary to have recourse to oral testimony to explain the consideration for which it was given,) set out all the circumstances in detail that may have been agreed on.

The undertaking also will be good where the promise was originally verbal, but is, subsequently to its being acted upon, reduced into writing (*c*).

With respect to the signature required by the statute, it is only necessary that the memorandum should be signed by the party to be charged, although not signed by the other contracting party. As the writing is required not to constitute but to prove the contract, it need not have been delivered to the party relying on it (*d*). A letter from a man to his own agent, or to any one else, containing the agreement, is sufficient (*e*).

A signature by the party as a witness, to the instrument containing or referring to the agreement, is sufficient, if, when he signed, he was aware of the contents (*f*). It is immaterial at what part of the instrument the signature is placed, whether at the beginning or end (*g*).

There must be an actual signing of the name (*h*), or something intended by the writer to be equivalent to a signature, as a mark by a marksman. If a man, instead of writing, be in the habit of printing his name, he will be held to have

(*c*) Longfellow *v.* Williams, 1 Peake's Ad. Ca. 225.

(*d*) Leathroap *v.* Bryant, 2 Bing. N. C. 744.

(*e*) Per Lord Hardwicke, 3 Atk. 503; 2 Cha. R. 147; 1 Vern. 110. Bateman *v.* Phillips, 15 East, 272. Longfellow *v.* Williams, Peake's Add. Ca. 225.

(*f*) 1 Wils. 118; 1 Vez. 6; 3 Atk. 502; 9 Vez. 251. Gosbell *v.* Archer, 2 Ad. & Ell. 508.

(*g*) Ogilvie *v.* Foljambe, 3 Merr. 62. Selby *v.* Selby, ib. 6. Knight *v.* Crockford, 1 Esp. 189. Right *v.* Price, Doug. 241. Johnson *v.* Dodgson, 2 M. & W. 653.

(*h*) Cotton *v.* Lee, 3 Bro. C. C. 564. Egerton *v.* Mathews, 1 East, 307. Selby *v.* Selby, 3 Merr. 2.

signed by his printed name instead of his written name (*i*). An undertaking in the defendant's own handwriting, beginning, "Mr. J. S. guarantees," &c., it seems, will be a sufficient signature (*j*), although a place for the signature is left at the bottom, which is never signed (*k*). An alteration of the instrument by the party with his own hand (*l*), or even writing over the whole instrument with his own hand, without signing it (*m*), or generally speaking the mere circumstance of the name of the party being written by himself in the body of the instrument (*n*), will not be held a sufficient signing to take the case out of the statute.

As the signature of one partner in a transaction relating to the partnership, binds all the partners, a guarantee given by one partner, in the regular course of dealing by the firm, is a signature, and binding on all the partners (*o*). Notwithstanding there should have been an agreement amongst the partners themselves that neither of them should give a guarantee (*p*), yet a guarantee by one partner, even without the knowledge of the others, and which may not be in the ordinary business of the firm, yet if it relates to business transacted by the partnership, and becomes subsequently known, or might, from the entries in the partnership books, have become known to the other partners, such guarantee is an undertaking by one partner in relation to business transacted by the other, and binds the firm (*q*). But as it is not incidental to the

(*i*) Saunderson *v.* Jackson, 2 Bos. & Pul. 238. Schneider *v.* Norris, 2 M. & S. 286. Johnson *v.* Dodgson, 2 M. & W. 653.

(*j*) Western *v.* Russell, 3 V. & B. 187. Propert *v.* Parker, 1 Russ. & Myl. 625. See Saunderson *v.* Jackson, 2 Bos. & Pul. 238.

(*k*) Ibid.

(*l*) Hawkins *v.* Holmes, 1 P. W. 770.

(*m*) Ithell *v.* Potter, ib.

(*n*) Stokes *v.* Moore, 1 Cox, 219.

(*o*) Sandilands *v.* Marsh, 2 B. & Ald. 673. Hope *v.* Cust, 1 East, 53. Ex parte Gardom, 15 Ves. 286.

(*p*) Hope *v.* Cust, 1 East, 53.

(*q*) Ibid.

general power of a partner to bind the firm by a collateral engagement, and as it is unusual for merchants or persons embarked in trade to give such engagements, the party seeking to enforce it, even in the partnership's name, must shew that the partner who signed it (*o*) had the authority from the other partners to sign in the name of the partnership, or, that the other partner had acted on and adopted the guarantee, or, that the giving such a guarantee had been consistent with a previous course of dealing with the privity of the other partners (*p*), or he must shew a subsequent recognition by the firm of the act and assurance of the party signing. If, however, one partner signing a guarantee in the name of himself and his co-partners, had no authority from the others to do so, it will bind himself, and he will be held to have described himself by the partnership firm, and be estopped from alleging that his name was other than that which he signed to the instrument (*q*).

It may be signed by an agent lawfully authorized. But the person to whom the guarantee is given cannot be the agent for the surety (*r*). The person signing as agent may be, by reason of infancy or coverture, incompetent to bind himself or herself as principal, but he or she may sign as the agent of and bind another (*s*).

If the agreement of suretyship be not under seal, the agent may be authorized by parol (*t*). The authority to sign as agent

(*o*) Ridley *v.* Taylor, 13 East, 175. Duncan *v.* Lowndes, 3 Camp. 478. Ex parte Peele, 6 Ves. 608. Ex parte Kirby, Buck, 511.

(*p*) Ibid.

(*q*) Elliott *v.* Davies, 2 Bos. & Pul. 338. Underhill *v.* Harewood, 10 Vez. 225.

(*r*) Wright *v.* Dannah, 2 Camp. 203.

(*s*) Com. Dig. Attorney, c. 4. Co. Litt. 52, *a*. Emerson *v.* Blonden, 1 Esp. 142. Palethorpe *v.* Furnish, 2 Esp. 311. Preswick *v.* Marshall, 7 Bing. 565. Prince *v.* Brunatte, 1 Bing. N. C. 438.

(*t*) Waller *v.* Headon, 5 Vin. Ab. 524. Coles *v.* Trecothick, 9 Vez. 234. Barry *v.* Lord Barrymore, 1 Sch. & Lef. 28. Emmerson *v.* Helis, 2 Taunt. 38.

may be inferred from circumstances, and the agency may be proved by parol evidence (*u*). A subsequent sanction or ratification of the act of the agent by the principal, when there has been no previous authority, will have the effect of fixing the principal (*v*). But the authority must be strictly pursued, in order to bind the principal (*w*). If an agent should declare at the time he signed the guarantee, that he had not authority on the part of his principal to sign it, the principal will not be bound (*x*).

The principal has power to revoke the authority he had previously given, at any time before the agent has signed the contract according to the statute, notwithstanding the agent had previously given a promise *verbally* to give a guarantee, and the person to whom he had given it had acted upon the faith of the promise (*y*).

In all the States of America, except Louisiana, the Statute of Frauds has been adopted, but in some of the States there has been a partial deviation from the language of the English statute.

The statutes in Virginia and Tennessee require that the *promise* or agreement should be in writing, and upon this distinction between these statutes and the English statute, it has been held that the case of *Wain* v. *Warlters* did not apply, and that the consideration for the promise need not be in writing (*z*).

By the revised statutes of Massachusetts, c. 74, s. 2, it is expressly provided that the consideration of the promise,

(*u*) Watkins *v.* Vince, 2 Stark. 368. Pickering *v.* Busk, 15 East, 38.

(*v*) M'Lean *v.* Dunn, 4 Bing. 722.

(*w*) Ibid.

(*x*) Howard *v.* Braithwaite, 1 Vez. & Bea. 202.

(*y*) Farmer *v.* Robinson, 2 Camp. 339, n.

(*z*) Violet *v.* Patton, 5 Cranch's Rep. 142. Taylor *v.* Ross, 3 Yerger, 330.

contract, or agreement, need not be set forth in the writing, signed by the party to be charged therewith, but may be proved by other legal evidence.

The English construction of the Statute of Frauds has been adopted in New York and South Carolina, and rejected in several other States (*a*).

Where the guarantee or promise, though collateral to the principal contract, is made at the same time with the principal contract, and becomes an essential ground of the credit given to the principal debtor, the whole is one original and entire transaction, and the consideration extends to and sustains the promise of the principal debtor, and also of the guarantor. No other consideration need be shewn than that for the original agreement upon which the whole debt rested, and that may be shewn by parol proof, as not being within the statute (*b*). If, however, the guarantee be of a previously existing debt of another, a consideration is necessary to be shewn, and that must appear in writing, as part of the collateral undertaking, because the consideration for the original debt will not attach to this subsequent promise, and to such a case the doctrine in *Wain* v. *Warlters* applies. But if the promise to pay the debt of another arises out of some new and original consideration of benefit or injury, moving between the newly contracted parties, it is then not a case within the statute (*c*).

In Louisiana the contract need not be in writing, but if

(*a*) Sears *v.* Brink, 3 John's Rep. 210. Leonard *v.* Vredenburgh, 8 ibid. 29 ; 2 Nott. & M'Cord. 372, n. Packard *v.* Richardson, 17 Mass. Rep. 122. Levy *v.* Merrill, 4 Greanleaf's Rep. 180. S. P. ib. 387. Sage *v.* Wilcox, 6 Conn. Rep. 81. Miller *v.* Irvine, 1 Dev. N. C. Rep. 103.

(*b*) Leonard *v.* Vredenburgh, 8 John's Rep. 29. D'Wolf *v.* Rabaud, 1 Peter's Rep. 476 ; 11 Johns. 221 ; 13 ib. 175.

(*c*) Leonard *v.* Vrendenburgh, 8 John's Rep. 29. Bailey *v.* Freeman, 11 ibid. 221. Hunt *v.* Adams, 5 Mass. Rep. 358. Clark *v.* Small, 6 Yerger's Tenn. Rep. 418. Leland *v.* Creyon, 1 M'Cord. 100 ; 3 Kent's Com. 3rd ed. 121-2.

the amount of the debt guaranteed exceed 500 dollars, it must be proved, at least by one credible witness and other corroborating circumstances; the corroborating circumstances which the code requires are not those stated by the single witness in his testimony, but those which appear *aliunde* (*d*).

By the law of Scotland, in order to prevent any *locus pœnitentiæ* to the cautioner, the cautionary obligation must be reduced to writing, except in those cases where performance has taken place upon the faith of the cautionary obligation or holograph (*e*), but if a *rei interventus* occur, an *informal* writing is valid (*f*). Where, however, the contract itself is verbal, and the caution or guarantee is interposed *in ipso actu*, it can be proved *prout de jure* (*g*). But an obligation for future contractions cannot be proved by parol testimony (*h*). It was said by Lord Eldon, that the principles of the law of Scotland, as to matters of guarantee, do not differ from those which prevail in England (*i*).

Some cautionary obligations are of a public, judicial, and more formal kind, such as caution at passing bills of suspension, caution *judicio sisti*, or *judicatum solvi;* caution for the price of lands purchased at a judicial sale; caution at loosing arrestment; caution in law burrows; caution at expeding confirmations; caution for judicial factors, or for tutors, and many others. According to the established practice which in this

(*d*) Cormier *v.* Le Blanc, 8 Martin's Rep. N. S. 458; 3 Louis. Rep. 214; Louis. Code, Art. 2257.

(*e*) Wallace, 25th Nov. 1782, Dict. p. 17056. Edmonstone *v.* Laing, 23rd June, 1786, p. 17057.

(*f*) Paterson *v.* Wright, 31st Jan. 1810, Fac. Coll. Dunmore Coal Company *v.* Young, 1st Feb. 1811, Fac. Coll.

(*g*) Bell, 13th Nov. 1812, Fac. Coll. Rhind *v.* Mackenzie, 20th Feb. 1816, Fac. Coll.

(*h*) M'Ewan *v.* Crawford, 13th Feb. 1816, Fac. Coll. Stair, b. 1, tit. 17, § 3, n. *a*.

(*i*) Grant *v.* Campbell, 6 Dow's App. Ca. 239, 252; Stair, Supp. 924.

CHAPTER III.

OF THE INTERPRETATION OF THE CONTRACT OF THE SURETY AND THE EXTENT OF HIS LIABILITY.

Of the interpretation of the contract of surety or guarantee.—The extent of the surety's liability to be expressed in, or necessarily comprised in the instrument.—The contract is strictissimi juris.—Sense in which this is to be understood.—If there be ambiguity which cannot be otherwise explained, construction against the party giving the guarantee.—Texts of the Civil Law.—Whether the principle of the rule deducible from those texts is not consistent with that of the law of England.—Rule in France.—Code Civil.—In the different states of Europe and America—Considered as to its subject.—Whether it be a single dealing or to a series of dealings.—Whether a debt already contracted, or to be thereafter contracted.—The amount of the sum.—The persons to whom and for whom the surety engages.—The duration of the suretyship.

THE extent of the liability to be incurred must be expressed by the surety, or necessarily comprised in the terms used in the obligation or contract.

It is to be construed strictly, that is, the obligation is not to be extended to any other subject, to any other person or to any other period of time, than is expressed or necessarily included in it. It was in the power of the person accepting the surety to have expressed (*a*), and it is his own fault if he has not expressly included the case to which he seeks to extend the liability of the surety (*b*). Natura fidejussionis sit strictissimi

(*a*) Casareg. de Comm. Disc. 34, n. 24.

(*b*) Muller's Prompt. tit. Fidejussor, n. 20, 21. Mæv. Decis. p. IX., 167, n. ult. Leyser Medit. Spec. DXXIV. Casareg. Disc. 35, n. 24. Disc. 197, n. 24. Voet, lib. 46, tit. 1, n. 13. Sande Decis. Fris. lib. 3, tit. 10, def. 4. Poth. Tr. des Oblig. part 2, c. 6. Denisart, tit. Caution, § 2, n. 11. Hering. de Fidejuss. c. 2, n. 50

juris, et non duret, vel extendatur, de re ad rem, de persona ad personam, de tempore ad tempus (*c*).

In this sense only must be understood the expression, that the contract of the surety is to be construed strictly. It is subject to the same rules of construction and interpretation as every other contract. The rule "verba ambigua fortius accipiuntur contra proferentem," a rule, which Lord Bacon says, is "drawn out of the depth of reason," but to be adopted only when other rules of exposition have failed, is as applicable to the contract of a surety as to any other contract.

It has been sometimes supposed that this rule was inconsistent with that which was adopted in the civil law. Amongst the texts from which this inference is drawn are the following:—

"Quidquid adstringendæ obligationis est, id nisi palam verbis exprimitur, omissum intelligendum est, ac fere secundum promissorem interpretamur; quia stipulatori liberum fuit verba late concipere. Nec rursum promissor ferendus est, si ejus interierit, de certis potius vasis forte, aut hominibus actum. Si stipulatus hoc modo fuero, *Si intra biennium Capitolium non ascenderis, dari?* non nisi præterito biennio recte petam: nam etsi ambigua verba sunt; sic tamen exaudiuntur, si immutabiliter verum fuit te Capitolium non ascendisse (*d*).

"Si ita stipulatus fuero, *Decem aut quindecim dabis?* Ita si ita *Post annum* aut biennium debentur. Quia in stipulationibus id servatur: ut quod minus esset, quodque longius, esse videretur in obligationem deductum" (*e*).

"Si quis stipulatus sit, *Stichum, aut Pamphilum, utrum*

(*c*) Maur. de Fidejussor, p. 2, s. 5, c. 2, ex num. 34, cum seq. Salgad. in labyx. cred. p. 1, c. 9, n. 76, *et seq.* Rot. Decis. 646, n. 12 and 13. 1 Casareg. de Commercio. Disc. 35, n. 24.

(*d*) Dig. lib. 46, tit. 1, l. 99.

(*e*) Ibid. l. 109.

ipse vellet: quem elegerit, petet et is eris solus in obligatione" (*f*).

"Cum quæritur in stipulatione quid acti sit, ambiguitas contra stipulatorem est" (*g*).

"In stipulationibus, cum quæritur, quid actum sit: verba contra stipulatorem interpretanda sunt" (*h*).

The Code Civil adopts this principle, which is thus expressed, Le cautionnement ne se présume point, il doit être exprès, et on ne peut l'étendre au-delà des limites dans lesquelles il a été contracté (*i*).

It is a principle established by all the cases in England and Scotland, that the contract of a surety is not to be extended by implication (*j*). It must be recollected, however, that under the civil law the person *proferens verba* was the party to whom the stipulation was made, "the stipulator." The words of the stipulation were necessarily those of the person to whom the promise was made; the person promising only assented to the question proposed by the person stipulating (*k*).

The principle on which the rule of the English law is founded, is precisely that on which these texts of the civil law proceed; the words employed in the law of England are those of the party promising, in the civil law, they were the words of the party to whom the promise was made. A late eminent

(*f*) Dig. lib. 46, tit. 1, l. 112.

(*g*) Ibid. lib. 34, tit. 5, l. 26.

(*h*) Ibid. lib. 45, tit. 1, l. 38, § 18.

(*i*) Code Civil, Art. 2015.

(*j*) Dance *v.* Girdler, 1 N. R. 41. Johnston, July 8, 1680, Dict. 2076. Nimmo, Feb. 2, 1700, Dict. 2076. Innes, Feb. 8, 1728, Dict. 2079. Crichton, Dec. 1612, Dict. 2074. Halyburton, July 12, 1735, Dict. 2073. Herdman, Dec. 9, 1699, Dict. 2078. Crichton, Strachan, and Co., June 30, 1797, F. C. Dict. 8229. Sime, Jan. 13, 1824, 2 S. & D. 604. Glyn *v.* Hertel, 8 Taunt. 208. Myers *v.* Edge, 7 Term Rep. 254. Bacon *v.* Chesney, 1 Stark. 192; Bell's Princ. pp. 69, 77.

(*k*) Voet, lib. 45, tit. 1, n. 26.

Judge has expressed it with his accustomed perspicuity, "The words employed in the guarantee are the words of the defendant (the surety), and there is no reason for putting on a guarantee a construction different from that which the Court puts on any other instrument. With regard to other instruments, the rule is, that if the party executing them leaves anything ambiguous in his expressions, such ambiguity must be taken most strongly against himself (*l*).

The rule as to the interpretation of instruments is thus stated in Shepherd's Touchstone (p. 87), "Verba chartarum fortius accipiuntur contra proferentem, et quælibet concessio fortissime contra debitorem interpretenda est" (*m*).

The civil law in the contracts of sale and hiring adopted the rule, because in both those contracts, the seller and hirer were the parties who were expressing those contracts. In contrahenda venditione ambiguum pactum contra venditorem interpretandum est (*n*). Obscuritatem pacti nocere potius debet venditori qui id dixerit quam emptori, quia potuit re integra apertius dicere (*o*). Veteribus placuit pactionem obscuram vel ambiguam venditori et qui locavit nocere in quorum fuit potestate legem apertius conscribere (*p*).

Vinnius has given the following commentary upon these texts, and those already cited, with respect to stipulations: "Et Papianus quidem (*q*) respondit, veteribus placuisse, pactionem obscuram vel ambiguam venditori et qui locavit, nocere; utpote in quorum potestate fuerit, legem apertius conscribere, l. veteribus, 39 hoc tit. ut et Paulus l. *in contrahenda,*

(*l*) Hargrave *v.* Smee, 6 Bing. 244. Mason *v.* Pritchard, 12 East, 227. See Nicholson *v.* Paget, 1 Cr. & Mee. 48.

(*m*) Co. Litt. 183, *a.* Thorpe *v.* Thorpe, 1 Lord Raym. 235. Dann *v.* Spurrier, 3 Bos. & Pul. 339. Doe *v.* Dixon, 9 East, 15.

(*n*) Dig. lib. 50, tit. 17, l. 172.

(*o*) Ibid. lib. 18, tit. 1, l. 21.

(*p*) Ibid. lib. 2, tit. 14, l. 39.

(*q*) Vinnius de Pactis, c. 20, n. 4.

172, de reg. jur. Et Celsus, cum quæritur in stipulatione quid actum sit, verba contra stipulatorem interpretenda esse ait; quia stipulatori liberum fuit verba late concipere. Cæterum id ipsum quoque et in emptore, et conductore, et promissore similiter admitti debet, si et ipsi legem obscuram dixerint, nec appareat, quid inter contrahentes actum sit. Et enim vel ipsa naturalis ratio docet, unumquemque contrahentium sibi imputare suæque imprudentiæ expensum ferre debere, quod non apertius locutus fuerit. Merito itaque Paulus pactum emptioni appositum secundum venditorem, contra emptorem, qui legem contractui dixerat, minusque aperte locutus fuerat, interpretatur in specie (*r*). Celsus *in d. l. quidquid*, 99, *de verb. oblig.* postquam de stipulatore verba fecit, statim subjicit de promissore in eandem sententiam, *nec rursum promissor ferendus est, si ejus interierit, de certis potius vasis forte aut hominibus actum esse.* Quod valde circa hanc quæstionem considerandum arbitror, quoniam autem plerumque à venditore, locatore, stipulatore pactum interponitur et lex contractui dicitur, inde est, quod contra eos pactionem obscuram vel ambiguam exponi auctores nostri tradiderunt."

Lauterbach states the doctrine which the jurists had extracted from these texts of the Civil law (*s*). "Et si ex his et aliis obscuritas tolli nequit, facienda est interpretatio contra illum, qui verba obscura et ambigua protulit, et scripturam formavit, cujusque in potestate fuit, legem contractus apertius dicere vel scribere, l. 39, de pact. l. 21, ff. h. t. in quibus et aliis juris textibus, nim. in l. 33, ff. h. t. l. 172, de R. I. l. 26, de R. I. l. 38, § 18, l. 99, ff. de V. O. venditoris, locatoris, et stipulatoris mentio fit tantum exempli gratia, et quia his ut plurimum edicunt, qua lege, quia vendant, locent, et stipulentur, Mudæ. de contrah. emp. cap. 2, ad. l. Labeo. 21, h. l.

(*r*) Dig. lib. 18, tit. 1, l. 34.
(*s*) Disput. 151. Th. 113.

u. I. et Seq. Riemer d. § 31, n. 11, Frantzk. h. l. n. 70, et Seq. Dinner, a. concl. 7, n. 4.; d. l. 21, n. 8. vid Dinner, d. concl. 7, n. 1 et 2." (*t*)

This rule of construction, and the principle on which it rests, will be found in the jurisprudence of the different states of Europe and in America.

Groenewegen, in treating of the first title of the 45th book of the Digest, says, "Hodiernis Moribus confusa sunt pactorum et stipulationum jura" (*u*).

In France, even before the Code Civil, the solemnity of the stipulation under the Roman law did not prevail even in those parts of the kingdom which adopted the Droit Ecrit or Civil law (*v*). The term stipulation was used, as the same author says, "pour signifier les conventions et les clauses de contrats" (*w*). The 7th rule of interpretation, in Pothier, Traité des Obligations, is not inconsistent with this view. He treats the lessor as the person who was expressing the contract: "Lorsque le Bailleur veut que le Blé lui soit rendu dans son grenier, il doit s'en expliquer par le Bail" (*x*).

The Code Civil, art. 1162, says, "Dans le doute, le convention s'interprète contre celui qui a stipulé, et en favour de celui qui a contracté l'obligation."

In another article, 1602, "Le vendeur est tenu d'expliquer éclairement ce à quoi il s'oblige (*y*). Tout part obscur ou ambigu s'interprète contre le vendeur."

Pardessus gives the following exposition of these articles and the principle on which they are founded: "Mais toutes choses égales de part et d'autre, la clause douteuse doit s'interpréter

(*t*) Voet, lib. 45, tit. 1. n. 23. Lauterbach, Disc. 151. Th. 113.
(*u*) Groeneweg. ad lib. 45, tit. 1, l. 1, ad Cod. lib. 2, tit. 3.
(*v*) Ferrier Inst. liv. 3, tit. 16, 361, *et seq.*
(*w*) Ibid. 363.
(*x*) Pothier, trait. des Oblig. part 1, c. 1, § 1, art. 7.
(*y*) Pardessus, p. 2, tit. 1, c. 2, § 3.

contre celui qui, par la nature du contrat, était maître d'en dicter les conditions, fût-ce même le débiteur, lorsque s'étant engagé, sans restriction, et veut ensuite en supposer, parce qu'il était maître, de ne pas s'obliger sans prendre ses précautions" (*z*).

It may then be considered that the contract of guarantee or surety will be subject, as every other contract, to the rule that, where there is ambiguity or obscurity which the other parts of the instrument do not explain, it is to be construed, *potius contra proferentem*, that is, against the party giving the contract.

The contract of suretyship or guarantee being "stricti juris," or as some jurists describe it, "strictissimi juris," the principle is "ut non duret vel extendatur de re ad rem, de personâ ad personam, de tempore ad tempus." It has therefore to be examined with reference to the subject or amount for which the surety makes himself liable, the persons to whom and for whom he engages to be liable, and the time during which he engages to continue liable. In the construction of the contract this principle is adopted in its fullest extent, and is illustrated by the decisions of English tribunals, as well as by the texts and decisions of jurists and judicial tribunals in the different states of Europe and America (*a*).

As to the subject of the contract; the liability of the surety will not be extended to any other subject than that which is expressed or included in the contract.

"Fidejussor in causam limitatam, extra illam etiam causam non teneatur. Ut cunque magnus sit fidejussionis effectus, non tamen extendatur ad ea, quæ sunt extra naturam contractus vel extra conventa. Fidejussor in certam causam, ultra illam non teneatur; ad unum actum, non intelligatur

(*z*) Liv. 1162, 1602.

(*a*) Ratcliffe *v.* Graves, 1 Vern. 196. Sheffield *v.* Lord Castleton, 2 Vern. 393. Rawstone *v.* Parr, 3 Russ. 424. Samuel *v.* Howarth, 3 Meriv. 272. Howell *v.* Jones, 1 C., M. & R. 97; 2 Cr., M. & R. 385.

obligatus ad alium, licet pro eadem personâ. Unde, si fidejussor se obligaverit pro *pensione* sedium, non intelligitur pro deterioratione obligatus esse, quia alia est pensio, alia deteriorationis aestimatio" (*b*).

"Si fide jussit qui simpliciter pro eo, qui res alterius stitim, seu arresti detineri curavit, ac deinceps laxato arresti perperam facti vinculo, arrestans in expensas, damna, et id quod interest, condemnetur fidejussor etiam tenetur nomine deteriorationis quæ rebus detentis illata fuit: secus, si tantem pro impensis arresti fidem interposuisset. Responsa Jurisc. Holl, A. par. 1, consil. 279 (*c*).

"Si fidejussor existat, interest, utrum simpliciter in certam quantitatem ex tali negotio debitam, an vero nominatim quoque in usuras fidejussit, aut totius negotii obligationem sua fide esse voluerit; nam si simpliciter pro certa tantum quantitate fidem interposuerit; nec ex sua mora usuris obnoxius effici potest, quia stipulatione, quæ stricti juris est, alienam suscepit obligationem; nec ex mora rei principalis quia in eam causam se non devenerit (*d*).

"Si in pignore contrahendo deceptus sit creditor, qui fidejussorem pro mutuo accepit, agit contraria pignoratitia actione, in quam actionem veniet quod interest creditoris. Sed ea actio fidejussorem onerare non poterit: non enim pro pignore, sed pro pecunia mutua fidem suam obliget" (*e*).

Again, a guarantee "in id quanti locaverim faciendum," does not extend to reimburse that which may have been expended by the party in doing the work himself. "Stipulatus es, opus arbitratu tuo ante certam diem fieri; quod si effectum non esset quanti, ut efficiatur opus, locasses, tanti

(*b*) Hering. de Fidejuss. c. 24, n. 35, *et seq.*
(*c*) Voet, lib. 46, tit. 1, n. 12.
(*d*) Ibid. lib. 46, tit. 1, l. 13.
(*e*) Dig. lib. 46, tit. 1, l. 54.

fidejussores cepisti; et quia opus effectum non erat, alii locasti, et cum posterior conductor satis non daret, ipse opus fecisti. Quæro an fidejussor teneatur? Respondit: secundum ea verba stipulationis quæ à te proposita sunt, fidejussores non tenentur, non enim id fecisti quod in stipulatione convenerat id est, opus alii non locasti, tametsi postea locasti: ea enim locatio quam secutus es, perinde est, ac si interposita non esset, etsi statim tu opus facere cæpisses" (*e*).

The Code Civil adopts this principle of construction (*f*), "Le cautionnement ne se présume point, il doit être exprès, et on ne peut l'étendre au delà des limites dans lesquelles il a été contracté."

This principle is also followed in the codes of the Two Sicilies, Sardinia, Switzerland, Holland, Bavaria, Austria, and Prussia, and in the States of America.

The Louisiana code adopts in terms the article 2015 of the Code Civil.

If the obligation of the surety is expressed to be for the payment of the rent of the obligee's tenant, he is not liable for any other demand which the landlord may have against him for repairs or otherwise (*g*).

So where the condition of a bond given by the surety of the defendant a bailiff, which recited that the sheriff had appointed the defendant bailiff of a hundred within his county, was declared to be, that the defendant should execute all warrants to him directed, it was adjudged that the word "all warrants," should be intended to be only all warrants which were directed to the defendant as bailiff of the said hundred, and not other warrants (*h*).

(*e*) Dig. lib. 46, tit. 1, l. 44.

(*f*) Article, 2015.

(*g*) Voet, lib. 46, tit. 1, n. 12. Poth. Tr. des Oblig. p. 2, c. 6, s. 5, § 404.

(*h*) Stoughton *v.* Day, Aleyn's Rep. 10. S. C. Styles, 18.

A bond had been given as a security for a collector of customs; afterwards, a new duty was laid upon coals, a deputation was given to the same person to collect it, and a new security taken on account of such new duty; it was held that the first bond did not extend to the new duty (*i*).

A guarantee was given to pay for such gold as A. might supply to a working goldsmith for the purpose of his trade. A. discounted bills of exchange for the goldsmith, and furnished the amount of the bills, partly in money, *and partly in gold;* such a transaction was held not within the terms of the guarantee, and that the surety was not liable even for the amount of the gold so supplied, though it was supplied to the goldsmith in the way of his business (*j*).

A guarantee was given to be answerable for the use of a named house of trade. The house was, at the time the guarantee was given, under liabilities to the persons guaranteed, to secure which the latter held an advance to a certain amount, the acceptances of such house, and which, upon receiving the guarantee, they delivered up to the house, and took new notes from the house; such interchange of existing notes was not *a loan of money* within the the guarantee, which was prospective, and contemplated only an advance of money, leaving the past transactions as they were (*k*).

A surety for a public officer is responsible only for those acts which are done by virtue, or under colour, or by means of the office he holds (*l*). "Modo officialis vel massarius arcis, vel saltuarius, vel ministralis, dedit fidejussorem in princip. officii, solum tenebitur pro malè gestis, vel ministratis circa ipsum officium, non autem tenetur, si principalis deliquit modo aliquo circa non pertinentia ad officium suum, sed circa extranea, et remota ab ipso officio" (*m*).

(*i*) Bartlett *v.* Attorney General, Parker's Rep. 277. Bowdage *v.* Attorney General, ib. 278. Fell on Guaranties, 92.

(*j*) Evans *v.* Whyle, 5 Bing. 485. S. C. 1 Mood. & M. 468.

(*k*) Glyn *v.* Hertel, 8 Taunt. 208. S. C. 2 J. B. Moo. 134.

(*l*) Cod. lib. 11, tit. 34. De Marsil. 182. Hering. de fidej. c. 24, n. 177.

(*m*) Hering. c. 24. n. 177. Marsil. n. 182. Merlin Repertoire de Jurisprudence Caution. § 1, p. 465.

The surety for a clerk to a private person or firm, is liable for those defaults only which the clerk has committed in the course of his employment. The nature of that employment is to be ascertained from the previous practice of the person or firm by whom the clerk is employed. The sureties of C., a clerk to a banking company, engaged to make good all losses which might arise to the company from the negligence of the clerk. A customer of the bank had requested them to send a trusty person to receive his rent. The distance was twelve miles from the banking house. The bank had been in the habit for three previous years of thus sending for it, and they charged the customer with the expense thus incurred. The bank sent the clerk C., who received the rent, but lost it on his return home. Although it was proved not to be the usage of bankers to send for money into the country, yet the Court decided, that the money was received by C. in the course of his employment as the clerk of the company, and that the sureties were liable (*n*).

Under a contract of guaranty for the due accounting by a collector of taxes to be received by virtue of an act of Parliament, the surety will not be answerable for the monies received by the collector, unless the collector is legally appointed under the act, and is authorized to receive such duties under it, although it may have happened that the collector has received sums from the subjects as and for such duties (*o*). But if he had been appointed under an act of Parliament to collect certain rates and duties, but which act gave no power to collect the rates in question, but only enacted that the rates and duties should be collected under the regulations of any act to be passed in the same session of Parliament relating to such duties, and the act referred to was passed in the prior part of the session; it was held, that the act duly authorized the collection of the duties,—that the words "any act to be passed in the present session," must be taken with reference to the com-

(*n*) Melville and Another *v.* Doidge, Nov. 27, 1848, L. J., C. P. 7.
(*o*) Nares *v.* Roules, 14 East's Rep. 511.

mencement of the session, which is a thing of continuity, and embraces both the past and the future portions of it (*o*).

Under the condition of the bond of a surety of an overseer, that he shall truly account for all such money as shall come into his hands by virtue of his office of overseer, such surety is not liable for a sum borrowed by the overseer and applied by him to parochial uses, as an overseer has no authority as such to borrow money (*p*).

The sureties of a sheriff's officer are only liable for the due performance of the officer's duty. Therefore, where the officer entered into an agreement on the sale of goods taken in execution, and thereby exceeded his authority, they were held not liable for money received under this agreement (*q*).

A. and B., by deed, jointly and severally covenanted with C. to pay her an annuity during her life, and by another deed of the same date, A. and B. covenanted with each other that each should pay one-half of the annuity, and indemnify the other against "all actions, damages, demands, sums of money, and expenses, which might be incurred by reason of the non-payment thereof." It was held, that B. having, in consequence of A.'s insolvency, made several payments of A.'s moiety of the annuity, was not entitled to interest on the sums he had so paid (*r*).

The defendant requested the plaintiff by letter to advance R. B. 2*l.* a week, and engaged "to pay him all monies he might advance to R. B. in addition to the 24*l.* which he had already let him have:" it was held, that the guarantee was to be read as if it had been "all such monies," *i. e.*, the 24*l.*, and the amount of the subsequent weekly sums of 2*l.*; and that it did not extend to any other sums he might advance over and

(*o*) Nares *v.* Roules, 14 East's Rep. 511.
(*p*) Leigh *v.* Taylor, 7 B. & C. 491.
(*q*) Cash *v.* Palmer, 6 B. & C. 739; 9 D. & R. 723.
(*r*) Bell *v.* Free, 1 Wils. C. C. 51.

above the allowance of 2*l.*, because this allowance was the subject-matter of the letter (*s*).

In Scotland the cautioners for messengers are bound "for the damage, interest, and expenses which the lieges shall sustain through the negligence, fraudful, or informal execution of the messenger." The cautioners are liable only for what the messenger does or neglects to do in his proper office of messenger; not in the office of agent, in which occasionally a messenger is employed in combination with his ministerial duties. Thus, where the messenger, instead of pounding the debtor's effects, received them from him, and sold them by public auction, and applied the proceeds to his own purposes, his cautioners were not held liable for the money allowed to come into his hands, as his malversation was in the character of agent (*t*).

In estimating the damage arising from neglect, the creditor is not bound to show his loss,—the law presuming that the damage arising from the non-execution of diligence is the amount of the debt (*u*). Where the diligence to be executed is personal, which operates indirectly, this presumption is absolute, and not to be overcome by proving the desperate circumstances of the debtor, and the hopelessness of recovering the debt (*v*). Nay, even where the diligence is direct, (as pounding,) the Court does not admit any evidence to shew, speculatively, that this diligence would probably have not produced payment (*w*).

Notaries, before they are admitted to the exercise of their office, find surety for the faithful exercise of their functions;

(*s*) Smith *v.* Brandram, 2 Scott's N. R. 539; 9 Dowl. P. C. 441; 5 Jur. 173.

(*t*) Welsh *v.* M'Veagh, 18th Jan. 1781; 2 Hailes, 876; 1 Bell's Com. 365. Hamilton *v.* Frazer, 14th Feb. 1817, F. C.

(*u*) Chatto *v.* Marshall, 17th Jan. 1811; 16 F. C. 121.

(*v*) Ibid. 1 Bell's Com. 365.

(*w*) Ibid.

and questions on the negligence or irregularity of their proceedings are determined on the same principles which regulate the case of a messenger. It is not necessary to make out a case of fraud or dole: the cautioner will be liable also for error or neglect.

It has been held, that the cautioner for a notary is not responsible for errors or neglects in the exercise of the office of town clerk, which is separate from that of a notary. And it rather appears, that where a writer sends a sasine, &c., to a notary to be executed, already written out but erroneous, the notary will not be liable, nor his cautioners responsible, for the errors into which he is thus betrayed (*x*).

If the contract state a specific sum for which the surety becomes liable, as where it expresses the principal sum owing by the debtor and makes no mention of interest, the liability of the surety will be limited to the principal sum, and will not extend to the interest which may be due thereon. "Pro Aurelio Romulo conductore vectigalis centum annua Petronius Thallus et alii fidejusserant; bona Romuli fiscus ut obligata sibi occupaverat et conveniebat fidejussores tam in sortem quam in usuras; qui deprecabantur; lecta subscriptione fidejussionis, quoniam in sola centum annua se obligaverant, non in omnem conductionem: decrevit fidejussores in usuras non teneri" (*y*).

Upon a contract to guarantee a bill of exchange for a given sum, the surety will not be liable even to that extent on a bill given for a larger sum (*z*).

The contract had, in the preceding case, expressed the sum for which the surety engaged to be liable.

The general rule is:—"Fide jussores non obligari ad id,

(*x*) 1 Bell's Com. 366.

(*y*) Dig. lib. 46, tit. 1, l 68. Poth. Tr. des Oblig. p. 2, c. 1, s. 5, § 105. Voet, lib. 46, tit. 1, n. 13.

(*z*) Phillips v. Astling, 2 Taunt. 206; Ross, Feb. 12, 1824, 12 S. 427.

quod eo mora debitoris ad principalem obligatione accedere potest. Et hoc amplius, nihil interest utrum ante moram rei acceptus sit fidejussor, vel an post moram rei, utroque enim in casu non sit plenior illius obligatio" (*a*). But if the surety had bound himself *in omnem causam*, he is liable for whatever interest becomes payable by reason of the debtor's delay (*b*).

He will be liable to the full extent which the terms of the obligation, or the nature of the act for which he has obliged himself will warrant. Thus if the terms are general and indefinite, he is bound for all the obligations of the principal debtor necessarily incident to, or resulting from the contract or act for which he has become surety. In this case he is said to be a surety in *omnem causam* (*c*).

"Si fidejussor se in omnem causam ab initio obligaverit; tunc enim in id quoque, quod ex mora debitoris obligationi principali accedere potest, tenetur, ferat enim sibi acceptum, quod ab initio hanc legem contractui dixerit.

"Si usuræ pacto vel stipulatione à reo promissæ fuerint, (quo hodie nihil est frequentius,) ita ut jure actionis exigiqueant, idque fidejussorem non latuerit, quod fidejussor simpliciter pro reo qui eas debet, fidejubens, ad easdem quoque sit obligatus.

"Fidejussor enim vere dicitur eandem summam promississe per relationem ad instrumentum rei principalis, etiamsi non specificet in instrumento fidejussionis.

"Et quicunque actionis aut negotii alicujus nomine intercedit, in omnem causam intercedere intelligitur, nisit taxationem certam fidejussioni apposuerit" (*d*).

(*a*) Hering. de Fidejuss. c. 24, n. 124, 130.

(*b*) Voet, lib. 46, tit. 1, n. 13.

(*c*) Lauterbach, lib. 46, tit. 1, n. 29. Mantica de tacit. Convent. lib. 16, tit. 14, n. 24. Pothier, Tr. des Oblig. part 2, c. 6, s. 5, n. 404.

(*d*) Hering. c. 24, n. 132, 3, 4.

"Indefinita enim ea jure æquipollet universali, et insuper simpliciter fidejubens etiam fidejubere videtur in omnem causam ex natura illius negotii descendentem" (*e*).

Thus if the obligation express in general terms that he becomes surety *des bail*, he will be liable not only for the rent but for every other obligation which was incurred by the tenant, *i. e.*, for the damage done by the tenant, for repairs, for the value of the utensils and instruments of husbandry which the tenant was bound to restore. "Si à colono stipulatus, fidejussorem accepi: una stipulatio est plurium persionum et ideo in universis pensionibus fidejussor tenetur" (*f*).

"Par exemple, si le cautionnement pour lequel quelqu'un s'est rendu envers moi caution pour mon fermier, porte en termes généraux qu'il s'est rendu caution du bail, il sera tenu non-seulement du paiement des fermes, mais généralement de toutes les obligations du bail (*g*); comme, par exemple, des dégradations, de la restitution des avances, ou des meubles qui ont été laissés au fermier pour l'exploitation de la ferme, *dotes prædiorum;* des dommages et intérêts pour les anticipations que le fermier aurait laissé faire, etc.

Under those general terms he becomes liable as well for the interest as for the principal of the money owing by the principal debtor. "Si quis simpliciter se obstringit, in omnem causam, quæ ex numeratione, vel contractu, vel natura negotii, nasci potest, intelligitur obligatus" (*h*).

(*e*) Lauterbach, ib. n. 30. Dig. lib. 46, tit. 1, l. 56, § 2; l. 52, § 2. Pothier ad Pand. lib. 46, tit. 1, n. 35.

(*f*) Dig. lib. 46, tit. 1, l. 58, l. 52.

(*g*) Hering. de Fidejuss. c. 24, n. 132, 233, 234, 236.

(*h*) Mantica, lib. 16, tit. 14, n. 23. Dig. lib. 50, tit. 8, l. 2, § 12; lib. 19, tit. 2, l. 54; lib. 46, tit. 1, l. 2, § 11, l. 68. Poth. Tr. des Oblig. n. 404. Cod. lib. 8, tit. 1, l. 10. Carpz. p. 2, c. 19, def. 8. Sande, lib. 3, tit. 10, def. 4. Strych. h. t. § 11, 12.

"Celui, qui se rend caution en termes généraux, est aussi tenu non-seulement du sort principal dû par celui pour qui il s'est obligé, mais encore de tous les intérêts qui en seraient dus.

"It est tenu non-seulement de ceux qui sont dus *ex rei naturâ*, mais même de ceux qui produit la demeure en laquelle est le principal débiteur. Paulus respondit, si in omnem causam conductionis fidejussor se obligavit, eum quoque exemplo coloni, tardius, illatarum per moram coloni pensionum præstare debere usuras."

Fidejussor facile intelligitur se obligasse eodem modo quo se obligavit reus principalis.

Hinc V. G. "si ut proponitur quum pecunia mutua daretur, ita convenit, ut in Italia solveretur: intelligendum mandatorem quoque simili modo contraxisse" (*i*).

"Qui generaliter fidejubet pro eo qui ex aliquo contractu obligatus est, intelligitur fidejubere in omnem obligationem quæ ex illo contractu descendit" (*j*).

"Hinc etiam fidejussores à colonis datos, etiam ob pecuniam dotis prædiorum teneri convenit, quum ea quoque species locationis vinculum ad se trahat. Nec mutat confestim an interjecto tempore fidem suam adstrincerunt" (*k*).

"Et quidem in usuras se obligasse videtur, quum *in omnem causam* fidejusset. Hinc V. G. "qui fidejusserint proconductore vectigalis in universam conductionem, in usuras quoque in jure conveniuntur nisi proprie quid in persona eorum verbis obligationis expressum est" (*l*).

The Code Civil adopts the same principle. "Le cautionne-

(*i*) Poth. ad Pand. lib. 46, tit. 1, s. 4, n. 34, l. 61.
(*j*) Poth. ad Pand. lib. 46, tit. 1, s. 4, n. 35.
(*k*) Poth. ad Pand, lib. 46, tit. 1, n. 35, l. 52, § 2.
(*l*) Dig. lib. 50, tit. 8, l. 2, § 12. Hering. ib. Poth. ad Pand. lib. 46, tit. 1, s. 4, n. 36.

ment indéfini d'une obligation principale s'étend à tous les accessoires de la dette, même aux frais de la première demande, et à tous ceux postérieurs à la dénonciation qui en est faite à la caution" (*m*).

That which is a necessary part of the transaction guaranteed comes under the guarantee. Thus Duncan indorsed Leach's bill; Leach failed to pay it; and the holder agreed, on a guarantee by Duncan & Company, to give indulgence to Duncan, by raising money on bills in the meanwhile, and pushing Leach. The guarantee was in these terms: "As you seem to apprehend loss from your friendly interposition in the business with Leach, we therefore guarantee you against this." The original bill was not paid, and more debt was accumulated on the bill transactions for intermediate accommodation. Duncan & Company acknowledged their liability for the original bill, but refused to pay the balance. The Court held them liable for the loss attending the drawing of bills originating from Leach's bill remaining unpaid (*n*).

Again, if a person become surety for the guardian's care of a minor's estate, he is understood to be bound *in omnem causam* although not so expressed, and, therefore, he is liable to all such balance and interest as may be decreed against the guardian (*o*). "Cum pupillus à tutore stipulatur rem salvam fore, non solum quæ in patrimonio habet sed quæ etiam in nominibus sunt, ea stipulatione videntur contineri, quod enim in tutelæ judicium venit, hoc et ea stipulatione continetur (*p*). Si postea quam pupillus ad pubertatem pervenerit tutor in restituenda tutela aliquandiu moram facerit, certum est et fruc-

(*m*) Code Civil, Art. 2016. Merlin Rép. tit. Caution, s. 1.

(*n*) 1 Bell's Com. 374. Sime *v.* Duncan, 2 Shaw & Dunlop, 604.

(*o*) Voet, lib. 46, tit. 1, n. 13. Dig. lib. 46, tit. 1, l. 69. Hering. de Fidejuss. c. 24, n. 155. Montanus de Tut. c. 40, n. 33.

(*p*) Hering. de Fide. c. 24, n. 279.

tuum nomine et usurarum medii temporis tam fidejussores quam ipsum teneri" (*q*).

The liability of a surety *pro gestis tutelæ* extends ad gesta extra tutelam quæ sint connexa ratione tutelæ, that is, so adhere to, and are connected with the acts of the tutor as to be incapable of being separated from or referred to any other cause (*r*).

The rule, "quod fidejussor ad unum actum non intelligitur obligatus ad alium licet pro eadem personâ," renders it necessary to ascertain whether the surety has engaged to be liable for one dealing, or for a course of dealings (*s*).

A bond entered into by A. and B. to the plaintiffs, to enable A. to carry on his trade, conditioned "for the payment of all such sums not exceeding 3000*l.*, which should at any time thereafter be advanced by plaintiffs to A., is not a continuing guarantee to the extent of 3000*l.* for advances made at any time, but only a guarantee for advances once made to the extent of 3000*l.*" (*t*).

A bankrupt gave to the defendants a warrant of attorney, with the following defeasance:—"The within warrant of attorney is given to secure payment of the sum of 4000*l.*, with lawful interest thereon." On the 4th of October, 1823, judgment was entered up on the warrant of attorney, and a fieri facias issued, under which certain bills of exchange, the subject of the action, were seized.

It was held that there was nothing on the face of the warrant of attorney or the defeasance to shew that it was intended to secure the balance existing at the time when it was given. In

(*q*) Dig. lib. 46, tit. 1, l. 90.
(*r*) Montanus de Tut. c. 39, n. 183, 184.
(*s*) Hering. de Fidejuss. c. 24, n. 39.
(*t*) Kirby *v.* Duke of Marlborough, 2 M. & S. 18.

the absence of anything to shew such an intention, it must be construed as a continuing security (*u*).

A guarantee by the defendant to the plaintiff "for any goods he hath or may supply W. P. with, to the amount of 100*l*.," is a continuing or standing guarantee to that extent for goods which may at any time have been supplied to W. P., until the credit was recalled, although goods to more than 100*l*. had been supplied and paid for.

At the time when the guarantee was given, goods had been supplied to W. P. to the amount of 66*l*. And another parcel was supplied afterwards, amounting together to 124*l*., all which had been paid for, and the sum now in dispute was for a further supply of goods to W. P.

This was held to be a continuing or standing guarantee to the extent of 100*l*., which might at any time become due for goods supplied, until the credit was recalled. The meaning was, that the defendant would be answerable at all events for goods supplied to his brother to the extent of 100*l*. at any time, but that he would not be answerable for more than that sum (*v*).

Where any particular transaction is specified, or distinctly pointed at, the guarantee can be held to extend only to that transaction: as where a letter of credit is subjoined to an order for goods, the guarantee is confined to that order (*w*).

Where the expression is general for goods to be furnished from time to time, or for *any* dealings to a limited extent; the guarantee will be limited in respect of the sum, but extended to successive transactions, and held, in mercantile phrase, to be a standing or continuing guarantee.

Where the sureties are bound generally for the intromissions

(*u*) Woolly *v.* Jennings, 5 B. & C. 165. Batson *v.* Spearman, 9 Ad. & Ellis, 298.

(*v*) Mason *v.* Pritchard, 12 East's Rep. 227.

(*w*) Melville *v.* Hayden, 3 B. & Ald. 593.

or faithful administration of the principal, and subjoin a limitation of their responsibility to a certain sum, should the balance due on his intromissions happen to exceed the sum limited in the cautionary obligation, the engagement of the cautioners is held to be a security for that balance, after applying in extinction of the debt whatever the estate of the principal may afford in the way of dividend. The cautioners are not, therefore, entitled to require that such dividend from the principal's estate should be rateably applied in extinction of their engagement. The creditor is entitled to apply it in payment pro tanto, leaving the engagement of the cautioners as his last resource. As, for example, if caution has been given to the extent of 500*l.* for the intromissions of a trustee, and he fails, with a balance of 1000*l.* against him, the creditor, after receiving from his estate a dividend of ten shillings in the pound, would still be entitled to demand from the cautioners the 500*l.* which they had guaranteed (*x*). This, it will be observed, is different from the case of advances made beyond a sum limited in a cash-credit. *There* an engagement is tacitly undertaken, to give no enlargement of the credit but on the footing of a common creditor, and so the cautioners will be entitled to an equality with the creditor. But in stipulating responsibility for a bank agent, the presumption is that the surety is to answer for a deficiency, which cannot, in the nature of things, be limited (*y*).

The Scottish banks have been accustomed to open with their customers a peculiar sort of cash account, or bank credit, which has produced great benefit to all branches of trade and manufactures. A cash credit of this description is an under-

(*x*) Maxton *v.* M'Intosh's Creditors, 17th Jan. 1777, 5 F. C. 352; 5 Brown's Supp. 488. Borthwick *v.* Balfour, 29th Jan. 1819, F. C. 641. Aff. on App. 1 Shaw's App. Cas. 1 Bell's Comm. 367.

(*y*) 1 Bell's Com. 367.

taking on the part of a bank to advance to an individual, or to a partnership, such sums of money as may be from time to time required, not exceeding on the whole a certain definite amount, to be repaid, and a continual circulation kept up by the replacing in the bank of small profits and sums as they come in.

A credit of 1000*l.* was given to Sibbald and Co. on a bond by W. Sibbald and J. Liddell, in the ordinary terms of similar bonds. The credit being nearly exhausted, a bill for 5000*l.* at twelve months, by W. Sibbald, was lodged and accepted to Sibbald and Co., as "to your credit when paid." On Sibbald and Co.'s failure, the cash account shewed a small balance in their favour; but two bills discounted, and then current, but not entered in the account, having been dishonoured, were brought into the account, turning the balance in favour of the bank, and a demand was made on the cautioners.

Liddell pleaded, first, the bills not being discounted under the credit, or entered in the cash account at the time, cannot affect the balance; second, if liable, he is in relief entitled to the collateral security of the 5000*l.* bill. Both defences were repelled, and the Court held that the bond covered these bills, and that their dishonour altered the balance as it stood at the bankruptcy, and that the bill of 5000*l.* was merely a source of additional credit beyond the cash account, and not intended as any additional security for that cash account, and that the whole balance was below the sum in the bond (*z*).

The liability will be confined to the debt already contracted, unless the obligation expressly refers to a future debt (*a*). "Cum stipulamur, quidquid te dare facere oportet: id, quod

(*z*) Liddell *v.* Sir L. Forbes, July, 1820; 1 Bell's Comm. 369.

(*a*) Casaregis de Commer. Disc. 197, n. 24, 25. Glyn *v.* Hertel, 2 Moore's Rep. 134. Houstoun *v.* Spiers, 12th March, 1820, Aff. 4 S. & D. 566. Ross *v.* Greg, 11th Feb. 1824. Brown *v.* Corbet, 5 Bing. 485; Melville *v.* Hayden, 3 Barn. & Ald. 593; 1 Cro. & M. 48.

præsenti die duntaxat debetur, in stipulationem deducitur: non ut in judiciis, etiam futurum, et ideo in stipulatione adjicitur verbum *oportebit;* vel ita, *præsens in diemve,* hoc ideo sit, quia qui stipulantur quidquid te dare oportet, demonstrat eam pecuniam, quæ jam debetur; quod si totam demonstrare vult, dicit *oportebitve;* ita, *præsens in diemve*" (*b*).

"Si à colono, cui fundum in quinquennium locaveram, post tres annos ita stipulatus fuero, *quidquid te dare facere oportet?* non amplius in stipulationem deducitur, quam quod jam dari oportet: in stipulationem enim deducitur quod jam dari oportet; si autem adjiciatur, *oportebitve:* etiam futura obligatio deducitur" (*c*).

A common bond, with a penalty, with a condition thereunder, to secure the payment of a sum of money, with interest from the day of the execution of the bond, payable at a day named (*d*), or upon demand (*e*), given to bankers by their customers, and a third person as the surety, will, as against the surety, be considered only as a security for the debt, then actually due from the customers to the bankers, and not as a security for any floating balance or contingent debt which may at any time be due to the bankers, notwithstanding there was a collateral agreement between the bankers and their customers that the bond had been deposited with the bankers as a security for such floating balance, provided there is no evidence to connect the surety with such collateral agreement. So where, by the condition of a bond, after reciting that at the request and for the accommodation of B., the plaintiff had accepted, drawn, or indorsed, negociated and paid sundry bills of exchange, several of which were still outstanding and unpaid, and, in order to indemnify and save him harmless in respect

(*b*) Dig. lib. 45, tit. 1, l. 76, § 1.
(*c*) Dig. lib. 45, tit. 1, l. 89. Sande's Decis. lib. 3, tit. 10, def. 4.
(*d*) Walker *v.* Hardman, 11 Bli. N. S. 229.
(*e*) Ibid.

thereof, and from all losses, costs, charges, damages, and expenses, the defendant had consented to join with B. in manner thereinafter mentioned, it was declared, that if B., his heirs, &c., should at all times thereafter pay to the plaintiff, upon demand, all such money as the plaintiff already had, or as at any time or times thereafter should or might advance, expend, or pay to, or for the use, or on account of B., and also all such money as the plaintiff then was, or at any time thereafter should or might become, or be subject or liable to pay, by virtue or upon account of his having accepted and engaged himself for the payment of any bills of exchange, promissory notes or drafts, at the request, or for the use of, or on account of B., the obligation should be void, it was held that such bond was an indemnity only in respect of those transactions between the plaintiff and B., for which the plaintiff had made himself liable previous to the giving of the bond (*e*).

So if the obligation be for the payment of a future debt, the surety is not liable for any part of the debt which had been already contracted (*f*).

Another branch of the rule respecting the construction of the contract of surety or guaranty is, that it shall not be extended *de personâ in personam.* Pactum cum unâ personâ factum ad aliam non extendetur-fidejussio non trahitur ad aliam personam is the doctrine of the jurists. A guarantee to A. for the fidelity of a clerk in his service does not extend to the service of that clerk after A. has taken in a partner, and the clerk continues in the service of A. and his partner. The defalcation against which he guarantees is that of the clerk in the service of A. and not his defalcation in the service of A. and his partner (*g*).

(*e*) Pearsall *v.* Summerset, 4 Taunt. 593.

(*f*) Glyn *v.* Hertel, 2 Moore's Rep. 134. Dykes, June 3, 1825, 4 S. & D. 69.

(*g*) Hering. de Fidej. c. 20, s. 10, n. 38, 39, 40, *et seq.*

Thus where it was the condition of the bond that one W. B. should, during his continuance in the service of the plaintiff as clerk, keep a just and true account of all monies received, and from time to time pay to the plaintiff all monies received by him belonging to the plaintiff into his hands, and the plaintiff having afterwards taken a partner, it was held, that the defendant having, during all the time the said W. B. continued in the service of the plaintiff alone, performed the condition of the said bond, ought not to be bound beyond the scope of his engagement, which was, to be answerable for the fidelity of the said W. B. to the plaintiff only, and, therefore, when he took in a partner there was an end of the obligation; and that non-payment of the money to the plaintiff and his partner was not within the condition (*h*).

The obligation of the surety may, however, be so framed as to extend to the surviving partners carrying on the concern upon the death of one of them (*i*), or to the introduction of some other persons into the firm (*j*), and this may be done upon the construction of a letter raising an agreement to that effect, when the original instrument is insufficient for such a purpose (*k*).

If, however, the security is given to a company, which necessarily means a fluctuating or successive body of persons who should, from time to time, be carrying on the business which the company professed to carry on, as a guarantee for the good conduct of a person whilst in the service of the said company (*l*), a change among the members of which the company is composed in the one case, or a change of partners

(*h*) Lord Arlington *v.* Meyrick, 2 Saund. 414; 3 Wilson, 530. Wright *v.* Russell, 2 Black. Rep. 934, S. C.

(*i*) Simson *v.* Cooke, 1 Bing. 452.

(*j*) Simson *v.* Cooke, *supra*. Augero *v.* Keen, 1 Mees. & W. 390. Pease *v.* Hirst, 10 B. & C. 122.

(*k*) Ex parte Marsh, 2 Rose, 239.

(*l*) Metcalf *v.* Bruin, 12 East, 400. S. C, 2 Camp. 422.

in the house of trade in the other, will not put an end to the indemnity. So where the condition of a bond, after reciting that A. and B. had filed a bill in equity against C. and D., was, that the surety obligor should pay all such costs as the Court should award *to the defendants* on the hearing of the cause, and D. having died before any costs were awarded, it was held, (Abbott, C. J., *dubitante*,) that the death of D. could not be pleaded in discharge of the bond, for the bond not being conditioned to pay such costs as the Court of Equity should award to C. and D. by name, but to pay such costs as should be awarded by that Court *to the defendants*, the meaning of the parties was, that the surety obligor should pay all such costs as should be awarded by the Court to those who at that time filled the character of the defendants in equity (*l*).

A bond, conditioned that H., whom the obligee had taken as a clerk, should duly account for and pay to the obligee, his executors and administrators, all money which the said H. should from time to time receive on account of the said obligee, his executors and administrators, does not make the surety liable for a default committed by the clerk after the death of the obligee, the clerk continuing in the employment of the plaintiff, who was the executor of the obligee, and carried on the same trade as the obligee (*m*).

In Scotland, where there is a change on the part of the creditor, where a cash credit bond is granted to a banking house, the partners of which happen to be materially altered during the currency of the credit, do the cautioners, Mr. Bell asks, continue responsible notwithstanding change, and without any notice or any renewal of their engagement? He answers, it would be a great hardship, even on the customers, if on every change all the bonds of credit of a banking house were to be

(*l*) Kipling *v.* Turner, 5 B. & Ald. 261.
(*m*) Barker *v.* Parker, 1 T. R. 287.

renewed; but there does not seem in law to be any necessity for this, and generally there is a stipulation against it in the bond (*n*).

A letter of credit, addressed to a company, will not authorize dealings with that company after a radical change in it. But probably the doctrine already stated, relative to credit bonds with companies, would be held to apply even to guarantees. A guarantee of furnishings to be made to a company will not authorize furnishings after a radical change in the partnership; though, if such furnishings are made *bonâ fide*, and in ignorance of any change, the guarantee will be effectual (*o*).

The surety's liability ceases upon the death or retirement of a partner in the firm, to whom the contract of suretyship is given, in a case where the engagement on the part of the surety is, to be answerable for the repayment of monies advanced to the principal by persons carrying on business together as partners, *or any or either of them*, the words "*or any or either of them*" being confined, in their meaning, to monies advanced by any or either of them during the partnership (*p*). An undertaking to be answerable to the partners and survivors or survivor of them, or the executors or administrators of such survivor, will not extend to a new partnership, although the difference in the two partnerships consists only in the introduction of the executor of a deceased partner in the place of his testator, to the latter of whom power had been given by the articles under which the original partnership was formed, and before the indemnity was given, to bequeath his share of the concern in favour of his wife and children, and who had accordingly bequeathed it to his executor in trust for such wife and children (*q*).

(*n*) 1 Bell's Comm. 371.

(*o*) Ibid.

(*p*) Weston *v.* Barton, 4 Taunt. 673. University of Cambridge *v.* Baldwin, 5 Mees. & Wels. 580.

(*q*) Pemberton *v.* Oakes, 4 Russ. 154.

A bond was given by A., reciting that B. intended to open a banking account with C., D., & E., as his bankers; the condition of the bond was, for payment to them of all sums from time to time advanced to B. at the banking house of C., D., & E.; it was holden, that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the payment of the old debt incurred in C.'s lifetime, A. was wholly discharged from the obligation (*a*).

Guarantees and letters of credit are limited to the persons to whom they are addressed, in whose discretion the writer is presumed to have peculiar confidence. A letter addressed to *one person*, authorizing him to introduce the bearer to dealers, will not authorize *another* to introduce him, to the effect of making a guarantee by the writer.

Three persons applied to Scott for a letter of recommendation to corn dealers in Leith. He gave them a letter to Mr. Sandeman, begging him "to introduce the three gentlemen, who will deliver you this, to any of your corn or grain merchants, assuring them of their safety in what bargains they make with them:" and the three names were subjoined. Two only of those persons went to Leith, and not finding Sandeman, they went direct to a corn merchant, (Stewart), and opened the letter to him, allowing him to take it as their recommendation. He sold them a whole cargo of oats. Stewart brought his action against Scott on this letter as a guarantee. The Court was very doubtful whether it was a guarantee, or any thing else than a mere letter of introduction. But, assuming it to be a guarantee, they held,—1. That Scott had relied on all the three persons, and on their mutual discretion in the proceedings to be taken under his letter. 2. That he

(*a*) Strange *v.* Lee, 3 East, 484.

had mainly relied on Sandeman's discretion to introduce his friends to proper dealers. 3. That it was (if a letter of credit at all) limited only by the discretion of the persons directly referred to acting in conjunction. Accordingly, Scott's defences were sustained (*q*).

A letter of credit, addressed to a dealer, will not authorize him to send the bearer of it to another dealer. Melville recommended Yetts to Durie for a supply of spirits, adding, "I am sure she will pay you at the time she may fix with you; so you are quite sure with her, as Mr. Gordon can also inform you." Durie wrote, on the back of the letter of credit, an assurance to C. and J. Philip, that, not having the article himself, he had sent Yetts with this letter of credit, on which they might rely. C. and J. Philip furnished the spirits, and Yetts failed. They brought their action against Melville. The Court held,—1. That Melville's was an effectual guarantee of the transaction, if made with Durie. But 2. They held unanimously, that a letter of credit, addressed to a particular person, is limited to him; and that the writer must be held to have granted it in reliance on his prudence and discretion in acting upon it: that such a letter contains no general power to interpose the writer's credit, or transmit his guarantee; and that this is specially to be observed, where the general terms of the letter make the personal limitation the only restraint on the responsibility of the writer (*r*).

A letter of credit to A. will not authorize B. to furnish the goods.

The same principle is applied to those cases in which the obligation of the surety relates to advances made by bankers or others to the principal debtor (*s*).

(*q*) 1 Bell's Com. 372.

(*r*) Philip *v.* Melville, 21st February, 1809, 15 F. C. 204.

(*s*) Strange *v.* Lee, 3 East's Rep. 484. Weston *v.* Barton, 4 Taunt. 673.

When the persons undertaken for are partners, and the surety's engagement is to secure the repayment of monies advanced to the principals, "or any or either of them;" the words "or any or either of them," are confined in their meaning to monies advanced to any or either of them, during the co-partnerships, respectively (*t*).

So if the partners, for whom the original contract was made, take in another partner, the surety is not liable for monies advanced by the new firm; for he was responsible according to his contract for the acts of his principal, and not for those of any future partner (*u*).

A change on the part of the company for whose use, and in whose name the credit is to be operated, as by the death of an old partner, or the adoption of a new one, if known to the bank, to whom the bond is given, will discharge the cautioner, unless there is either a renewal expressly of the last bond, or, at least, an implied assent to the change in consequence of distinct notice given to the cautioners (*v*).

The remaining branch of this rule is, that the suretyship should neither continue nor be extended a tempore ad tempus. Fidejussor qui in certum tempus se obligavit finito eo tempore in posterum non tenetur ex novo seu iterato cum debitore contractu.

If the obligation expresses that the surety is to continue liable for a limited period, and although he may be sued after that has elapsed, yet he can be made answerable only for those acts or defaults of the principal which had taken place before it had elapsed (*w*).

(*t*) Simpson *v.* Cooke, 1 Bing. 452. S. C. 8 J. B. Moo. 588.

(*u*) Wright *v.* Russell, 2 Bl. Rep. 934. S. C. 3 Wils. 530. Spurs *v.* Houston, 4 Bligh. App. N. S. 515. Dry *v.* Davy, 10 Ad. & Ell. 30.

(*v*) Spurs *v.* Royal Bank of Scotland, 1 Shaw & Dunlop, 554. 1 Bell's Comm. 370.

(*w*) Mantica de tacit. et Ambig. Convent. lib. 16, tit. 14, n. 33, *et seq.*

"Si cum Hermes vectigal octavarum in quinquennium conduceret, fidem tuam obligasti; posteaque spatio ejus temporis expleto, cum idem Hermes in conductione, ut idoneus detineretur non consensisti, sed cautionem tibi reddi postulasti, non oportere te de posterioris temporis periculo adstringi, competens Judex non ignorabit" (*x*).

"Igitur hoc primum dico, fidejussorem qui ad certum tempus se obligavit, finito eo tempore, in posterum non teneri, nec ex novo seu iterato cum debitore contractu obligari. Si ratio hujus assertionis quæritur, certum est eum, qui ad tempus fidem suam interponit, nolle post id tempus adstringi: at extra verba et conventionem fidejussio non est extendenda, cum sit contractus stricti juris" (*y*).

"Hinc rescriptum est, fidejussorem qui in certum tempus judicis sisti aliquem promisit, in tantum tempus duntaxat teneri, in quantum se obligavit" (*z*).

"Ubi cum quidam pro alio conductionis temporalis nomine fidem suam obligasset, et conductor finito tempore conductionis sine consensu fidejussoris in conductione detineretur, diserte respondet Alexander, fidejussorem non oportere de posterioris temporis periculo adstringi" (*a*).

"Denique æque iniquum foret, verbi causa, fidejussorem conductionis in quinquennium factæ teneri ea renovata de sexti anni pensione, quam iniquum foret eum renovatione conductionis liberari in quinquennium præteritum" (*b*).

So where the condition of a bond of a surety for a deputy postmaster, recited that the plaintiff, the postmaster general, had deputed one I. J. to be his deputy postmaster

(*x*) Codex, lib. 4, tit. 65, l. 7.

(*y*) Vinnius Quæs. lib. 2, c. 41. Hering. de Fidejuss. c. 2, n. 50.

(*z*) Cod. lib. 8, tit. 41, l. 27.

(*a*) Cod. lib. 4, tit. 6, 57, l. 7. Vinnius, ib.

(*b*) Vinnius, ib. Dig. lib. 45, tit. l. 99. Hering. de Fidejuss. c. 2, n. 50, and c. 24, n. 33. Vinnius Sel. Quæst. lib. 2, c. 41.

for *six months*, and the surety engaged thereby for the faithful execution of the office by I. J. during all the time that he should continue postmaster; it was held that the bond did not extend to any default by I. J., during his continuance in the office after the six months (*c*).

So where the condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues from time to time for twelve months, was, that at all times thereafter during the continuance of such his employment, or for so long as he should continue to be employed, he would justly account and obey orders, &c.; it was held that the obligation was confined to the period of twelve months mentioned in the recital; and *Lord Arlington* v. *Meyrick* was relied upon and recognised as a case expressly in point (*d*).

A bond was given, reciting the appointment of a person to an office, the duration of which is limited to a particular period, either *expressly* by an act of Parliament (*e*), or *impliedly* from the nature of the office itself, (as, for example), where the appointment is made by one, in virtue of an office which is itself limited, in which case the offices will be considered as co-existent (*f*) and conditioned for the due collection, by the person appointed to such office, of all monies received by him by virtue of such office, *at all times thereafter*, a due collection for the particular period, is a compliance with the condition, notwithstanding the words of the condition are general and indefinite as to time, and would of themselves extend the liability of the surety beyond the particular period. And the liability of the surety in a bond given to the obligees, *or*

(*c*) Lord Arlington *v.* Meyrick, 2 Saund. Rep. 403, 411.

(*d*) Liverpool Water Works Company *v.* Atkinson, 6 East. 507. St. Saviour's *v.* Bostock, 2 N. R. 175.

(*e*) Peppin *v.* Cooper, 2 B. & Ald. 431.

(*f*) Hassell *v.* Long, 2 M. & Sel. 363. The Wardens of St. Saviour *v.* Bostock, 2 N. R. 175. Leadley *v.* Evans, 2 Bing. 32. S. C. 9 J. B. Moore, 102. Curling *v.* Chalkden, 3 M. & Sel. 502.

their successors, conditioned for the faithful accounting by an officer appointed by the obligees, in virtue of their office, (such office being limited to a particular period, has been held not to extend beyond the time during which the obligees were in office; the word "successors" having been considered to have been introduced in ease of the collector, that he might discharge himself by immediate payment to those who would ultimately have the disposition of the money, and not to indicate any intention that the collector should continue to act after the obligees' successors came into office (*g*). But if the office which the person has been appointed to fill, and for the faithful discharge of the duties of which the surety has engaged to be answerable, is not limited in its duration (*h*), or being limited in its duration, it clearly appears from the condition, that the parties meant to provide for the continuance of the party in office, and for the responsibility of the surety upon a re-appointment of the same individual (*i*), the obligation of the surety will, notwithstanding the obligees themselves are annual officers, if given to them and *their successors* (*j*), continue in force, after the obligees to whom the bond is given, have gone out of office.

In a single transaction, if the surety has engaged on the footing of the credit of a certain extent in point of time, the creditor can in no case extend the time without the surety's consent, and on the other hand, the time cannot be abridged. In a guarantee of a small investment of goods for London at eighteen months' credit— on the question arising on the evidence of the credit being only twelve months, Lord Ellenborough said, "The claim as against a surety, is *strictissimi juris;* and it is incumbent on the plaintiff to shew that the terms of the

(*g*) Leadley *v.* Evans, 2 Bing. 32. S. C. 9. J. B. Moo. 102.
(*h*) Curling *v.* Chalkden, 3 M. & Sel. 503.
(*i*) Augero *v.* Keen, 1 Mees. & W. 390.
(*j*) M'Gahey *v.* Alston, 1 Mees. & W. 386. Augero *v.* Keen, *supra*.

guarantee have been strictly complied with. If I engage to guarantee, provided eighteen months' credit is given, the party is not at liberty to give twelve only, and after the expiration of six more to call upon me" (*k*). But often the time is specified without the *terminus a quo* being distinctly set down; as for example, a person binds himself to guarantee "the due payment of a bill of A. B. for six puncheons of spirits 'at three months.'" It seems, in such a case, that the custom of trade will regulate the date of the bills or *terminus à quo:* that in an inquiry into the custom, it is either the universal custom or the local usage which is to be followed, and that the surety will not be held to authorize such an extension of credit in point of time, as, though payment is only given as an indulgence; this being too arbitrary to be adopted in a Court of law (*l*).

(*k*) Bacon *v.* Chesney, 1 Stark. 192.
(*l*) M'Laggan, 19th Nov. 1813, 17 F. Coll. 137; 1 Bell's Com. 376.

CHAPTER IV.

THE CONTRACT,—ITS CONSTITUTION, &c., AND IN CASES OF CONFLICT THE LAW WHICH GOVERNS.

The rule "locus regit actum" to be adopted when there is a conflict between the lex fori and the lex loci contractus.—Doctrine of Jurists.—What is to be considered the locus contractus when the contract, by reason of the contracting parties being in different places, is concluded by correspondence; or when commenced in one country is completed in another country.—The double sense of the expression locus contractus.—The place in which it is made.—When it is to be performed in another country.—The locus contractus presumed to be that of performance where no other is mentioned.—The substantialia, or naturalia, accidentalia, and solemnia of the contract.—These governed by the place in which the contract is made.—The contract of surety governed by the lex loci contractus.—In what cases and for what purposes the law of the country in which the performance is to be made is admitted.

In the preceding chapters of this book the contract of suretyship has been considered: 1st, as to its nature and object; 2nd, the capacity of the parties by and to whom it is made; 3rd, the manner in which it is constituted. 4th, its interpretation or construction. As it may be enforced before the tribunals of another country than that in which it is made, and as the law of the former may differ from that of the latter, it is necessary to inquire which of these conflicting laws ought to be adopted in deciding on each of these heads.

According to the rule "locus regit actum" in ascertaining the nature, object, and effect of this contract, recourse must be had to the law of the country in which the contract was made.

"Quoties de vinculo obligationis vel de ejus interpretatione quæritur, veluti quos et in quantum obliget, quid sententiæ stipulationis inesse, quid abesse credi oporteat: item in omnibus actionibus, et ambiguitatibus quæ inde oriuntur, primum, quidem id sequemer quod inter partes actum erit (*a*): aut si non pateat quid actum est, erit consequens, ut id sequamur quod in regione in qua actum est, frequentur" (*b*). P. Voet has expressed the same opinion. "Quod si de ipso contractu quæratur, seu de naturâ ipsius contractus, seu iis quæ ex naturâ contractus veniunt, puta fidejussione, etc. etiam spectandum est loci statutum, ubi contractus celebratur, quod ei contrahentes semet accomodare præsumantur" (*c*).

Here it should be observed, that when the parties do not reside in the place where the contract is made, and it is effected by means of agents or letters, the place in which the final assent is given by the party to whom the proposition was made is that in which the contract is considered to have been made.

"Contractus, vel negocium inter absentes gestum dicitur eo loco, quo ultimus in contrahendo assentitur, sive acceptat, quia tunc tantum uniuntur ambo consensus" (*d*). Thus, if a merchant at Genoa, by letter or by his agent, offer his goods to a person at Venice for a certain price, and the latter agrees to purchase them at such price, the contract or sale is said to have been made at Venice; "Et sic ultimus consensus emptoris unitur cum illo præcedenti venditoris" (*e*).

The vendor is, by means of his letter or agent, deemed to be at present at Venice, and the sale concluded there. If, however, the merchant at Venice had refused to take the

(*a*) Dig. lib. 50, tit. 17.
(*b*) Burgund. Tr. 4, p. 32.
(*c*) P. Voet, § 9, c. 2, n. 10.
(*d*) Casaregis, Disc. 179, n. l.
(*e*) Ibid.

goods at the price demanded by the merchant at Genoa, but had made an offer to take them at a lower price, and the merchant at Genoa had acceded to that offer, then the contract of sale would be deemed to have been concluded at Genoa. "Quia ambo consensus tunc uniuntur Genuæ" (*f*).

Again, if a merchant in America addressed a letter to B. in London, conveying a request to the latter to purchase certain goods for him, and he complies with that request, two contracts are completed in London: that of *mandati* is completed when the merchant of that place there received the letter, and accepted the commission: that of sale is also completed there, because, as mandatory, he buys in the name of the mandant, and the vendor sells to the latter. So, if one himself be vendor, he would sustain that character in his own right, and the purchase would be in the name of the mandant (*g*).

If a merchant in America offers to a merchant in London certain goods at a certain price, and the latter declines taking them himself, but produces another purchaser, the sale takes place in London (*h*).

If a merchant in London purchase goods for his foreign correspondent, without an authority for that purpose, but the latter, on being apprised of it, consents to take them, the contract is deemed to have been made in London, and not in the place where the foreign correspondent gives his ratification.

Casaregis gives the reason: "Quia ille ratificationis consensus, licit emittatur in loco ratificantis, et ibi videatur se unire cum altero præcedenti gerentis consensu, qui venit à

(*f*) Ibid. n. 3. Hertius de Collis. Legum, § 56. Albion Insurance Company *v.* Mills, 3 Wils. & Shaw, 233. Whiston *v.* Stodder, 8 Martin's Rep. 95.

(*g*) Ibid.

(*h*) Hertius, de Collis. Legum, § 56. Albion Insurance Company *v.* Mills, 3 Wils. & Shaw, 233. Whiston *v.* Stodder, 8 Martin's Rep. 95.

loco gerentis ad locum ratificantis, ideo trahitur ad tempus, et ad locum, in quo fuit per gestorem initus contractus emptionis, vel aliud negotium pro absente, et ratio rationis est, quia consensus ratificantis non unitur in loco suo ad aliquem actum, seu contractum perficiendum, sed acceptandum contractum, vel negotium pro se in loco gestoris jam factum, ac si eodem tempore, et loco, in quo fuit per gestorem negotium gestum, ipsemet ratificans esset præsens, ibique contraxisset" (*i*).

When a contract is subject to a condition precedent, and the performance of that condition takes place in a different country from that in which the contract was made, the country in which the condition is performed is not deemed the "*locus contractus*," because "conditio expleta retrotrahitur ad tempus conventionis" (*j*). So where a contract was made for the sale of lands in New York by citizens then resident there, and the vendor afterwards removed to Pennsylvania, where the contract was consummated, and a mortgage given to secure the unpaid money, with New York interest, which was higher than that of Pennsylvania, the Court thought the mortgage not usurious, it being only a consummation of the original bargain made in New York (*k*).

When a contract is made in one country, but confirmed in another country, if the contract is not valid without that confirmation, the place of the confirmation is deemed the "*locus contractus.*" But if the confirmation merely regarded the proof of the contract "ad conciliandum contractui majorem fidem, *e. g.*, contractus probationis gratiâ in scripturam redigatur" (*l*), the "*locus contractus*" is that in which it was made, and not the place of the confirmation (*m*).

(*i*) Casaregis, Disc. 179, n. 20.

(*j*) Hertius. ib. § 56.

(*k*) Hosforth *v.* Nicholls, 1 Paige Rep. 220; Story's Comm. p. 243, n. 2.

(*l*) Hertius, de Coll. Leg. sect. 4, § 55.

(*m*) Ibid.

Another instance may be stated in which a contract is made in one country and completed in another, A merchant, resident in Ireland, signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, who transmitted it to B. in England for his use, who filled up the blanks and negociated it. It was held, that this was to be considered a bill of exchange by relation, from the time of the signing and indorsing in Ireland, and, consequently, that an English stamp was not necessary (*n*).

If a bill of exchange be drawn in one country, and accepted in another, the country in which it is accepted is considered the "locus contractus," as regards the acceptor: "Quid si de literis cambii incidat quaestio, quis locus erit spectandus? Is spectandus est locus ad quem sunt destinatæ, et ibidem acceptatæ" (*o*).

Notwithstanding an indorsement should be made in a different country, it will still remain a contract of the place where it was accepted (*p*).

The expressions, *locus contractus*, and *locus in quo negotiatio est*, are used by jurists in a double sense to designate, as well the place in which the contract is made "*ubi verba proferuntur*," as that in which it is to be performed: "Locum contractus," says P. Voet, "duplicem facio, alium, ubi fit, alium in quem destinata solutio. Illum locum verum, hunc fictum appellat Salicet. Uterque tamen recte locus dicitur contractus, etiam

(*n*) Snaith *v.* Mingay, 1 Mau. & Sel. Rep. p. 87. Russell *v.* Langstaff, Dougl. 514. Bayley on Bills, p. 6.

(*o*) P. Voet de Stat. sect. 9, 1, 2, § 14. De la Chaumette *v.* Bank of England, 9 B. & C. 208; S. C. 2 B. & Adol. 385. Poth. de Change, Art. 22. 1 Bell's Com. 388, *et seq.*

(*p*) Blanchard *v.* Russell, 13 Mass. Rep. 1, 11. 12. See also Prentiss *v.* Savage, 13 Mass. Rep. 20, 23, 24. Ory *v.* Winter, 16 Martin's Rep. 277. Sherrill *v.* Hopkins, 1 Cowen's Rep. 103; 13 Mass. Rep. 12; 12 Wheaton's Rep. 360; Story's Com. p. 287. Poth. Tr. de Change, Art. 22. Rickman *v.* Parry, 5 S. & D. 700.

secundum leges civiles, licet postremus aliquid fictionis contineat" (*q*).

The Digest contains two rules adapted to the two cases mentioned by this jurist; namely, when the contract is made and to be performed in the same country, &c.; and when the performance is not to take place in the same country in which the contract is made. According to one of these texts, on the sale of a farm, the warranty against eviction is governed by the law of the country in which the transaction takes place: "Si fundus venierit ex consuetudine ejus regionis in quâ negotium gestum est, pro evictione caveri oportet" (*r*).

According to the other text every one is deemed to have contracted in that place in which he has engaged to perform his contract: "Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit;" and again, "contractum non utique eo loco intelligitur in quo negotium gestum sit: sed quo solvenda est pecunia" (*s*).

Brunneman, in his Commentary, thus defines the *locus contractus:* "Duplex est, in quem destinata solutio vel in quo contractum est, nam locus destinatæ solutionis videtur esse ipse locus, in quo dicitur contractum: nam locus contractus intelligitur, ubi quid dari promissum est, seu in quo, ut quis solverit, se obligavit, licet alibi contractus fuerit celebratus" (*t*).

In considering this rule it should be observed, that the place in which the contract is made is presumed to be that in which it is to be performed, unless it expresses that it is to be performed in some other place. Hence, the law of the country in which the contract is made is that by which it is entirely to be governed, unless its performance is to take place elsewhere:

(*q*) P. Voet, § 9, c. 2, n. 11.
(*r*) Dig. lib. 21, tit. 2, l. 6.
(*s*) Ibid. lib. 42, tit. 5, l. 3.
(*t*) Brunn. Cod. lib. 3, tit. 18.

"Sin vero de eo nihil expressè dictum est, locus contractus intelligitur ubi negotium gestum est" (*u*).

Some things belonging to a contract were treated by jurists as being of its essence, and described as its substantialia; and others as its naturalia, or implied.

The latter might be rejected or modified by the express agreement of the parties. Again, other things formed, in their opinion, no part of the contract: they became a part of the contract only by the express agreement of the parties. These were called the accidentalia of the contract. There were others which were called by them the solemnia,—the solemnities or formalities of the contract.

When the place in which the contract is made is also that in which it is to be performed, or, rather, when no other place is expressed, whatever constitutes the essence of the contract, or falls within the description of its naturalia, is governed by the *lex loci contractus* (*v*). The doctrine of Dumoulin is expressly directed to all those circumstances which are either of the essence or nature of the contract (*w*). "In iis quæ spectant decisoria causæ, et litis decisionem, inspiciuntur statuta loci ubi contractus fuit celebratus, quoad effectus causatos, vel causandos, ex ipso contractu, secundam naturam contractus, nullo facto extrinseco occurente" (*x*): and again, "In concernentibus contractum, et emergentibus tempore contractus spectatur locus in quo contrahitur" (*y*). Casaregis has also expressed himself in terms equally direct and comprehensive when the question is, "De juribus contractus, cui robur, et specialis forma tributa est à statuto, vel à contra-

(*u*) Brunneman. ad Cod. lib. 3, tit. 18, n. 3. Carpz. 3, lib. 2, resp 29, n. 7.

(*v*) 2 Commentaries on For. & Col. Law, p. 849.

(*w*) Christin. Decis. 183, tom. 1. Mævius ad Jus. Lub. Quæst. 4, præl. n. 13, 15. Lauterbach, Disp. 104, p. 153; 2 Boull. 462.

(*x*) Boullenois, tom. 2, tit. 4, c. 2, Obs. 46, p. 462.

(*y*) Ibid. p. 472.

hentibus, attendatur statutum loci, in quo fuit celebratus contractus (*y*).

"Cui distinctioni adstipulatur altera, quod aut disseritur de qualitatibus, et conditionibus contingentibus in ipso contractu, et tempore contractus, prout in præsentis, et tunc inspiciendus sit locus contractus" (*z*).

The *lex loci contractus* also determines the nature and extent of the obligation incurred by the one, and of the right acquired by the other party to the contract.

Burgundus has applied this rule to the contract of suretyship.

"Sunt preterea quædam quæ circa contractus consistunt, ut fideijussio; quæ est tantanquam altera obligatio. Et ideo referre putandum est, quo in loco promittatur: constat enim inæqualem esse conditionem fidejussoris, ex cujusque regionis consuetudine. Nam subinde etsi verbis parem, re tamen imparem obligationem suscipit, quibusdam enim locis, qui simplex fidejussor pro altero extitit, ut principalis reus convenire potest. E contrà apud Gandenses fidejussores non aliter tenentur, quàm si debitorem creditor excusserit. Proinde formam accessoriæ obligationis, à loci natura ubi contrahitur, vimque et interpretationem admittere rationi consentaneume est" (*a*).

It would seem that if the *beneficium ordinis*, or *divisionis* existed in *loco contractus*, it ought to avail the party in *loco fori*, although it should not exist in the latter place. Thus, articles were supplied in Kentucky to a steam-boat belonging to two persons domiciled in Louisiana. In Kentucky the partners are liable *in solido*, but in Louisiana the partners of a steamboat are not liable *in solido* (*b*). An action being brought against them in Louisiana, it was decided that the law of

(*y*) Casareg. Disc. 179, n. 59. Aldera Mascard de Stat. Interp. Con. 7, n. 80.

(*z*) Casareg. ibid. n. 60.

(*a*) Burgund. Tr. 5, p. 38.

(*b*) Carroll *v.* Waters, 9 Martin, 500.

Kentucky must govern the contract, and that, therefore, the defendants were liable *in solido* (*a*).

It will have been perceived, that the expression *locus contractus* will apply to the place where the contract is to be performed, as well as to that in which it is made, and for some purposes the law of the place of performance must be adopted.

The place of performance is then *fictione juris* the *locus contractus* (*b*), and the general rule is, that "Ratione effectus, et complementi ipsius contractus, spectatur ille locus, in quem destinata est solutio, id quod ad modum, mensuram, usuras, etc., neglegentiam et moram post contractum initum accedentem, referendum est" (*c*).

This rule is adopted by jurists, and is recognised in England, Scotland, and the United States (*d*).

The rule is applied when the value of money in the place where the contract is made differs from that of the place in which it is to be performed (*e*). A bond executed in England for the payment of 100*l*., imports an obligation to pay 100*l*. sterling in England; and if, before the currency of the island was assimilated to that in England, an action had been brought in Jamaica on this bond, the amount recovered would be, in

(*a*) Ferguson *v.* Flower, 4 Martin, N. S. 313. Baldwin *v.* Gray, ib. 192. But see Fab. Cod. lib. 43, de except. Def. 1. Vinn. ad Inst. lib. 3, tit. 21. 3 Comm. on For. & Col. Law, 765.

(*b*) P. Voet de Stat. § 9, c. 2, n. 11.

(*c*) Ibid. n. 12.

(*d*) P. Voet, lib. 4, tit. 1, n. 29. Mynsing. cent. 4, Obs. 82, n. 5. Christin. tom. 2, decis. 134, n. 4. Fab. Cod. lib. 2, tit. 31, def. 2. Huber, lib. 1, tit. 3, § 10. Hertius, de Coll. Leg. § 55. Brunneman, ad Cod. lib. 3, tit. 18. 2 Boull. 488; 2 Fonbl. Eq. B. 5, c. 1, § 6. Robinson *v.* Bland, 2 Burr. 1077; Erskine, B. 3, tit. 2, § 40, n. 20. Ludlow *v.* Van Renseler, 1 Johns. Rep. 94. Thompson *v.* Ketcham, 8 Johns. 189. Fanning *v.* Consequa, 17 Johns. 511. Powers *v.* Lynch, 3 Mass. 77. 4 Cowen, 510, n. Van Reimsdyke *v.* Kane, 1 Gall. 371. Cox and Dick *v.* U. S., 6 Peter's, 172, 203. Prentiss *v.* Savage, 13 Mass. 20. Story's Confl. 234, § 234, et seq. 2 Kent's Comm. sect. 39, p. 457, et seq.

(*e*) J. Voet, lib. 12, tit. 1, n. 25. P. Voet de Stat. § 9, c. 2. Everard Cons. 68. Burgund. Tr. 4; 2 Boull. 498.

Jamaica currency, 140*l.*, together with such further sum as, at the time of the verdict, was the rate of premium current on bills of exchange drawn in Jamaica on England, and also the commission on the remittance (*f*). On the other hand, if a bond had been given in Jamaica for 100*l.*, it would import an obligation to pay 100*l.* currency in Jamaica. If an action had been brought in England on this bond, the obligee would have recovered, not 100*l.* sterling, but only the value of 100*l.* currency converted into sterling money, after deducting from it the current rate of premium on bills of exchange. The value of 100*l.* Jamaica currency was 71*l.* 8*s.* 6¾*d.* sterling, and if the premium on bills had been 10 per cent., the sum recovered would have been reduced by that amount (*g*).

If a bond had been given in England for 100*l.* sterling, payable in Jamaica, and an action had been brought on it in Jamaica, the payment would have been made in Jamaica currency at the par of exchange, and the obligee would have recovered 140*l.* Jamaica currency.

The doctrine of jurists leads to the same conclusion, whether the bond be granted with or without the word *sterling*. From the circumstance that it is to be paid in Jamaica the construction is, that the sum to be paid is that which is current there, and hence, in the case mentioned, if the bond had not contained the word sterling, the sum paid in Jamaica would be 100*l.* currency, which, at the par of exchange, would not be more than 71*l.* 8*s.* 6¾*d.* sterling.

The amount recoverable as damages on dishonoured bills varies very much. In Jamaica it is 8*l.* per cent.; in Barbadoes 10*l.* per cent.; in New York and Pennsylvania 20*l.* per cent.; and in Maryland 15*l.* per cent. The *lex loci contractus* determines the rate of damages which are recoverable. The drawer

(*f*) Cash *v.* Kennion, 11 Ves. 314; Act of Jamaica, 24 Geo. 2, c. 19.

(*g*) Scott *v.* Bevan, 2 B. & Ad. 85. Dungannon *v.* Hackett, 1 Eq. Ca. Abr. 288. Ekins *v.* East India Company, 1 P. Wms. 395. Lansdowne *v.* Lansdowne, 2 Bligh's App. Cas. 60. Delegal *v.* Naylor, 7 Bingh. 462. 5 Serg. & Rawle, 48. Story, ib. 281, 308, 9.

is liable for those prevailing in the place where the bill is drawn, but the indorser is liable for those given by the law of the place where he indorsed the bill. The indorsement is not simply the transfer of the paper, but a new and substantive contract (*h*).

The contract of drawer and indorser is not an engagement to pay the bill in the place on which it is drawn, but to guarantee that it shall be accepted and paid there by the person on whom it is drawn, and on his default, that they will reimburse the holder the principal damages in the place where the contract was made; that is, where it was drawn in the one case, and in the other, where it was indorsed (*i*).

If the contract be silent respecting interest, and no place for the performance be expressed, it will depend on the law of the place where the contract is made, whether any and what interest is payable (*j*).

If, on the other hand, the contract is not to be performed in the place in which it is made, the title to interest, and the rate of interest will depend on the law of the place of performance (*k*).

(*h*) Bailey on Bills, p. 121. Pardessus, Droit. de Comm. Art. 1500. 3 Kent's Com. pp. 116 to 120 (4th edit.). Powers *v.* Lynch, 3 Mass. 77. Prentiss *v.* Savage, 13 Mass. 20, 23, 24. Slacum *v.* Pomeroy, 6 Cranch, 221. Depau *v.* Humphreys, 8 Martin, N. S. 1, 14, 15. Hicks *v.* Brown, 12 Johns. 142.

(*i*) Potter *v.* Brown, 5 East, 124, 130. Hicks *v.* Brown, 12 Johns. 142. Powers *v.* Lynch, 3 Mass. 77. Prentiss *v.* Savage, 13 Mass. 20, 24. Pardessus, Droit. Com., Art. 1495, 1497. 2 Kent's Com. 459, 460. Chitty on Bills, p. 191 (8th edit.). Poth. Cont. de Change, n. 15, 155. Vidal *v.* Thompson, 11 Martin, 23, 24. Ory *v.* Winter, 16 Martin, 606. Lewis *v.* Owen, 4 B. & Ald. 654. Braynard *v.* Marshall, 8 Pick. 194. Story's Conf. § 317, et seq. Don *v.* Lipman, Clark & Fin. 1, 12, 13.

(*j*) J. Voet, lib. 12, tit. 1, n. 29. P. Voet, de Stat. § 9, c. 2, n. 10, l. 12. Math. de Auct. lib. 2, c. 4, n. 34. Math. Parœm. Belg. par 4, n. 13. 2 Boull. 451. Burgund. Tr. 4. Dumoulin, Gloss. 7, § 12, n. 35, 36, 37. Christin. tom. 1, Decis. 283. Wolf *v.* Johnson, 10 Wheaton, 383. Willing *v.* Consequa, 1 Peter's, 225. Hanreech *v.* Andrews, 9 Peters R. 10.

(*k*) Everard, Cons. 82. 2 Boull. p. 477. Montgomery *v.* Budge, 2 Dow & Clark, 297. Story, ib. § 291. 2 Kent's Comm. p. 39, 460, 1.

The rate of interest allowed by the law of the place where the contract is to be performed may always be expressly reserved, although it should exceed that which is allowed by the law of the domicil of the creditor or debtor, or of the *locus fori* (*l*).

Even where the rate is not expressly mentioned, yet when the payment is to be made in another country, the parties are presumed to have contracted with a view to that country, and the rate of interest may be that allowed by the law of the latter country (*m*).

In a case decided in Louisiana, the contract was to be performed in New York, and it stipulated for payment there of the Louisiana rate of interest, which was 10*l.* per cent.; whilst that at New York was 7*l.* per cent. The Court considered that the reservation of interest, according to the law of either state, would be legal, for there were two *loci contractus*, that *ubi contractus celebratur*, and that *destinatæ solutionis*.

Mr. Justice Story has expressed his doubts of the propriety of this decision. There does not seem to be any authority for permitting the party to reserve the highest rate of interest allowed by the law of the country where the contract is made, when the contract is to be performed in a place where such rate of interest is illegal (*n*).

In the opinion of that learned jurist, the parties cannot reserve to themselves a higher rate of interest than that which is allowed by the law of the place in which it is stipulated the payment shall be made.

If the delivery of moveables sold according to measurement

(*l*) Dumoulin, Gloss. 7, § 12, n. 35, 36, 37. 2 Boull. 472. 2 Simon's Rep. 194.

(*m*) Thompson *v.* Powles, 2 Simon's Rep. 194. Harvey *v.* Archbold, 1 R. & M. 184. 2 Kent's Com. p. 461. Depau *v.* Humphreys, 8 Martin's N. S. 1. Story's Confl. 295, et seq.

(*n*) Story's Confl. ib. 304, et seq.

is to be made in some other place than that in which the contract was made, and the measurement is not expressed, it is that which is adopted in the place where the moveables are to be delivered (*o*). "Quoad mobiles, præcipue fungibiles, spectanda mensura loci, in quo ex conventione præstandæ sunt; eo quod unusquisque contraxisse intelligitur in eo loco, qui solutioni destinatus est, seu in quo ut solveret, se obligavit" (*p*).

"Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit." And again, "Contractum autem non utique eo loco intelligitur quo negotium gestum sit, sed quo solvenda est pecunia" (*q*). Everard adds, "Sed ubi agitur de consuetudine solvendi, vel de his, quæ veniunt implendi, diu ex post contractum, et in alieno loco impletione destinato, tunc inspicitur locus destinatæ solutionis" (*r*).

The decisions are uniform in giving interest, according to the rate established by the law of the country where the contract is made, or where it is to be performed when no rate is expressly mentioned, and when the rate is mentioned, in determining it to be legal or illegal, as it is permitted or prohibited by the law of that place (*s*).

(*o*) 2 Boullenois, p. 500.

(*p*) P. Voet, de Stat. § 9, c. 2, n. 16. Burgund. ad Consuet. Fland. tract. 4, n. 28, 29. Matth. de Oblig. disp. 39, thes. 11. Voet, ad Pand. lib. 46, tit. 3, n. 8.

(*q*) Dig. lib. 4, tit. 7, l. 21. Ibid. lib. 42, tit. 5, l. 3. Story's Confl. 302, 3.

(*r*) 8 Martin's Rep. N. S. 25. Story's Confl. ib. 250.

(*s*) Bodily *v.* Bellamy, 2 Burr. 1096, Robinson *v.* Bland, ibid. 1077. Ekins *v.* East India Company, 1 P. Wms. 396. Auriol *v.* Thomas, 2 T. R. 52. Harvey *v.* Archbold, 3 B. & C. 626. Thompson *v.* Powles, 2 Sim. Rep. 194. Arnolt *v.* Redferne, 3 Bing. Rep. 353. Conner *v.* Bellamont, 2 Atk. 382. Cash *v.* Kennion, 11 Ves. 314. Ranelagh *v.* Champant, 2 Vern. 395, and note ib. by Raithby. Boyce *v.* Edwards, 4 Peter's Rep. 3. Fanning *v.* Consequa, 17 Johns. R. 511. S. C. 3 Johns. Ch. R. 610. De Sobry *v.* De Laistre, 2 Harr. & Johns. R. 193, 228. Smith *v.* Mead,

"Si alio in loco graviorum usurarum stipulatio permissa, in alio vetita sit, lex loci in quo contractus celebratus est, spectanda videtur in quæstione, an moderatæ, an vero modum excedentes, usuræ per conventionem constitutæ sint. Dummodo meminerimus, illum proprie locum contractus in jure non intelligi, in quo negotium gestum est, sed in quo pecuniam ut solveret, se quis obligavit" (*t*).

Christinæus expressly professes to follow the doctrine of Everhardus on this subject. "Consuetudo loci" (says he) "ubi contrahitur spectanda est, scilicet quoad observantiam solemnitatum ipsius actus. Generalitur enim in omnibus, quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis ubi fit negotiatio quia consuetudo influit in contractus et videtur ad eos respicere, et voluntatem suam eis accomodare. Idque recte. Conditio quoque loci et temporis perfectionem formæ etiam respicit, et idcirco à regione contractus vicissim diriguntur" (*u*). He adds: "Sed quoad ejus executionem, utpote quoad solutionem faciendam inspicienda venit consuetudo destinatæ solutionis" (*v*). And again: "Quoad

3 Connect. R. 253. Winthrop *v.* Carlton, 12 Mass. R. 4. Foden *v.* Sharp, 4 Johns. R. 183. Cox and Dick *v.* United States, 6 Peter's R. 172, 202. Duncan *v.* United States, 7 Peter's Rep. 435. Hosford *v.* Nichols, 1 Paige R. 220. Houghton *v.* Page, 2 N. Hamp. R. 42. De Wolf *v.* Johnson, 10 Wheaton's R. 367, 383. Depau *v.* Humphreys, 8 Martin's Rep. N. S. 1. See Van Schaik *v.* Edwards, 2 Johns. Cas. 355. Vidal *v.* Thompson, 11 Martin's R. 23. 2 Kent's Com. 460. Story's Confl. 303. Wilkinson, June 28, 1821, 1 S. & D. 89. Alex. Campbell *v.* Ramsay, Hannay, and others, Feb. 15, 1809. Gillow and Co., May 21, 1824, 3 S. & D. 45. Maxwell, Hyslop, and Co., June 16, 1824, 2 S. (Ap.) 451. Keble, Nov. 23, 1827, 6 S. & D. 119. July 14, 1830, 4 W. & S. 166. St. Patrick Assurance Company, Nov. 14, 1829, 8 S. D. & B. 51. Montgomery and Budge, 2 Dow & Clark's Rep. 298.

(*t*) J. Voet, lib. 22, tit. 1, § 6, p. 938.

(*u*) Christin. Decis. 283, vol. 1, n. 1, 4, 5, 9, 10, 11, p. 355.

(*v*) Ibid. n. 8, 9, p. 355.

ea quæ celebrato contractu veniunt facienda, inspicitur consuetudo loci, ubi ea debent fieri, tradi, solvi" (*w*).

Gregorio Lopez states only the general doctrine. "Quando contractus celebratur in uno loco, puta in Hispali, et destinata solutia in Cordubæ; tunc non inspicitur locus contractus, sed locus destinatæ solutionis" (*x*).

Bonds for the faithful discharge of the duties of office are often given with sureties, by public officers, to the government of the United States; and it sometimes happens, that the bonds are executed by the principals in one state, and by the sureties in a different State, or in different States. Mr. Justice Story states the law by which the contract is governed, when the rights and duties of sureties are different in different States. In Louisiana one system prevails, deriving itself mainly from the civil law; in other States a different system prevails, founded on the common law. It has been decided, that the bonds in such cases must be treated as made and delivered, and to be performed by all the parties at the seat of the government of the Union, upon the ground that the principal is bound to account there; and therefore, by necessary implication, all the other parties look to that as the place of performance, by the law of which they are to be governed (*y*).

In a recent case, the Supreme Court of the United States have adopted the doctrine, that, where a contract is made in one place to be executed in another, it is to be governed, as to usury, by the law of the place of performance, and not by the law of the place where it is made. So that, if the transaction is *bonâ fide*, and not with intent to evade the law against usury, and the law of the place of performance allows

(*w*) Ibid. n. 10, 11, p. 355.

(*x*) 20 Martin's R. 9, 17. Dig. lib. 44, tit. 7, l. 21. Story's Confl. 300.

(*y*) Story's Confl. 291. Cox and Dick *v.* United States, 6 Peter's R. 172. 202. Duncan *v.* United States, 7 Peter's R. 435.

a higher rate of interest than that permitted in the place of the contract, the parties may lawfully stipulate for the higher interest (*z*).

SECTION II.

OF THE CAPACITY OF THE PARTY BY OR WITH WHOM THE CONTRACT IS MADE.

The capacity depending on age or coverture conferred by a personal law.—The doctrine that the capacity or incapacity conferred by the law of the domicil of origin remained, notwithstanding a change of domicil.—This doctrine not maintainable.—Reasons for considering that if capacity exists in loco contractus, incapacity by the law of the domicil cannot be admitted to invalidate the contract.—The authority of tutors, &c., governed by the lex loci contractus.—The capacity or incapacity of a married woman decided by the law of her husband's domicil.

THE capacity or incapacity of the party to contract the obligation of a surety, may become a question, and hence it is necessary to ascertain the law by which that question may be decided (*a*). All laws which regulate the capacity of persons to contract, are treated by jurists as personal laws. Such are the laws which relate to majority and minority, to the powers of tutors and parents, the powers or disabilities caused by coverture; they are considered as governed by the law of the domicil (*b*).

(*z*) Andrews *v.* Pond, 13 Peter's R. 56, 77, 78. Story's Confl. 50, et seq.

(*a*) Boullenois Obs. 4, pp. 46, 51, 74, 78, 122. 2 Boull. App. 48. Merlin Rep. Statut. Pothier, Coutume d'Orleans Introd. c. 1, Art. 6. Rodenburg De Div. Stat., tit. 2, c. 5, § 16. Le Brun. Trait. de la Comm. liv. 2, c. 3, § 5, n. 25. Bouhier, Cont. de Bourg. c. 28, § 64. Froland, Mem. de Stat. Boullenois, tom. 2, tit. 4, c. 2, obs. 46. Liverm. Diss. § 26.

(*b*) Rodenburg, lib. 2, c. 1, p. 27, 28. Fœlix du Droit Intern.

According to the opinion of some jurists, the qualities which a personal law has once conferred, are so indelibly impressed on the person, that they accompany him to all places, and are not affected by any change of his domicil. If the person had not attained the age of majority prescribed by it, he is a minor in any other country in which he acquired another domicil, notwithstanding he had attained the age which, by the law of the latter domicil, was that of majority (*c*).

"Boullenois has stated the doctrine among his general principles—

"Ces loix personelles affectent la personne d'une qualité, qui lui est inhérente, et la personne est telle partout." And again: "Les loix pures personelles, soit personelles universelles, soit personelles particulières, se portent partout: c'est-à-dire, que l'homme est partout de l'état, soit universel, soit particulier, dont sa personne est affectée par la loi de son domicil. L'état personel du domicile se parte partout. Habilis vel inhabilis in loco domicilii est habilis vel inhabilis in omni loco." (*d*)

Froland lays down the same doctrine:—A personal statute not only exerts its authority in the place of the domicil of the party, but its provisions follow the party, and accompany his person in every place where he goes to contract (*e*).

Bouhier adopts the rule of Boullenois:—"Il faut donc tenir pour constant, que la capacité ou l'incapacité, que la loi du domicil a imprimée sur la personne, la suit en tous lieux. En sorte que ce seroit inutilement, que, étant incapable au lieu de

(*c*) Huber, De Conflict. Leg. lib. 1, tit. 3, § 12. Frol. and Mem. c. 7, § 13, 14. 2 Boull. Obs. 32, p. 7-14. Bouhier, Cont. de Bourg. c. 22, § 4 to 10.

(*d*) Boull. Diss. sur quest. de Cont. de Disc. Prelm. p. 20, Reg. 10.

(*e*) 1 Froland, Mém. de Statut. c. 9, § 2, p. 156. Ibid. vol. 2, c. 33, § 8, 9, 10, p. 1574. Bouhier, Cont. de Bourg. c. 23, § 92, p. 461. Ibid. c. 24, § 11, p. 463. Ibid. c. 22, § 5 to 11, p. 418. Voet. De Stat. § 4, c. 2, n. 6, pp. 137, 138. Henry on For. Law, c. 4, p. 34. Pothier, Introd. Gén. Cout. d'Orléans, c. 1, Art. 7. Hertius, Opera, § 4, n. 5, p. 121, n. 8, p. 123. Ibid. pp. 172, 173, 175. Story's Confl. § 50, et seq. Fœlix de Droit Intern.

sa résidence, elle voudroit aller contracter dans un endroit, où il auroit été capable si elle y avoit été domicilée." Abraham à Wesel uses language equally strong:—"Quoties cunque enim de habilitate at que inhabilitate personæ quæritur, toties domicilii leges et statuta spectanda, ut quo cunque persona abeat, id jus sit quod judex domicilii statuerit" (*f*).

A doctrine which had the effect of making the competence of a person to contract, and the validity of his transactions with others, depend on the law of a country with which he had, perhaps, ceased to be connected from the earliest years of his infancy, was so much opposed to those considerations of mutual interest and convenience, on which alone the recognition of foreign law takes place, that it has been rejected by the greater number of jurists. They consider that when the domicil of origin has been changed, the law of that domicil no longer prevails, but yields to that of the new domicil. Rodenburg maintains this opinion: "personæ enim status et conditio cum tota regatur à legibus loci, cui illa sese per domicilium subdiderit, utique mutato domicilii, mutari et necesse est personæ conditionem" (*g*).

It is also adopted by Hertius: "Status et qualitas personæ regitur a legibus loci, cui ipse sese per domicilium subjecit: atque inde etiam fit ut quis major hic alibi, mutato scilicet domicilio, incipit fieri minor" (*h*).

Burgundus says: "Conditio personæ à causâ domicilii tota regitur . . . . proinde ut sciamus quâ ætate minor contrahere possit, respicere oportet ad legem domicilii . . . . consequenter dicamus, si mutaverit domicilium persona, novi domicilii conditionem induere" (*i*).

D'Argentré gives this rule: "Locus originis nusquam in

(*f*) Wesel, Com. ad Novell Const. ult. Art. 18.
(*g*) Rodenburg, p. 2, tit. 2, c. 1, n. 3.
(*h*) Hertii Opera, § 4, p. 123, § 8. P. Voet, de Stat. § 4, c. 2, p. 123.
(*i*) Burgund. Tr. 2, n. 67.

foro considerationem habet, cùm aliud domicilium proponitur" (*j*).

Lauterbach's doctrine is, "Tota enim personæ conditio et status regitur à legibus loci cui ipsa sese per domicilium subjecit" (*k*).

Pothier holds that " le changement de domicile délivre les personnes de l'empire, des lois du lieu du domicile qu'elles quittent, et les assujettit à celles du lieu du nouveau domicile qu'elles acquièrent" (*l*).

Boullenois admits that the status of the person depends on the law of the actual domicil, but he makes an exception in respect of the status of majority or minority, which he insists depends on the law of the domicil of origin (*m*). Merlin, in the earlier edition of his *Répertoire Universel*, strenuously maintained the same opinion (*n*). He has, however, since changed it, and, is to be added to the number of those who consider that the status of majority or minority is governed by the law of the actual domicil, and not of the domicil of origin (*o*).

But the place of the contract may not be that of the domicil of the contracting party, and in that case the *lex loci contractus* must govern. There are jurists who have maintained that the law of the domicil ought alone to decide the question whether the party is a minor. But other jurists maintain that the question, whether the party has attained the age which constitutes majority, must be determined by the *lex loci contractus*.

Schrassert has stated the obligatory force of the *lex loci*

(*j*) D'Argentré, Art. 218, Gl. 6, n. 49. Story's Confl. 52, et seq.
(*k*) Lauterb. Disp. 72, Thes. 69, n. 261, 2.
(*l*) Pothier, tom. 10, c. 1, n. 13, p. 3.
(*m*) Tom. 2, 19.
(*n*) Merlin, Rep. Autor. Marit. § 10, Art. 4.
(*o*) Merlin, tit. Majorité, § 4. Effet Retro. Sect. 3, § 2, Art. 5, n. 3. And see these titles, and Autor. Marit.

contractus in terms which would imply that the capacity to contract, in respect of the person's age, was governed by it. "Siquidem de cujuslibet contractus subsistentia dijudicetur ex statutis ejus loci, ubi actus fuit celebratus; eo quod actus solemnis, judicialis vel extrajudicialis, sortitur essentiam secundum legim loci, ubi fit. Adeo quidem ut etiam forensis, alibi contrahens, hoc ipso statutis illius loci se submittere censeatur; perinde ut agens in judicio alieno id ipsum agnoscere et in id consentire censetur ut ibidem ne conventus exceptione incompetentiæ se tueri nequeat" (*p*).

Huber's language is also very comprehensive. "Contractus celebrati secundum jus loci, in quo contrahuntur, ibique tam in jure quam exta judicium, etiam ubi hoc modo celebrati non valerent, sustinentur: id que non tantum de forma, sed etiam de materia contractus affirmandum est" (*q*). He illustrates this proposition by stating that if a woman whose domicil is not in Saxony, should contract in Saxony, she cannot act without a curator; but a woman, although domiciled in Saxony, if contracting in any other place where no such law prevails, might make a valid contract without the intervention of a curator (*r*).

The predominant influence of the principle that the *lex loci contractus*, in determining the construction, the legal effect, and the *vinculum obligationis* of the contract is undisputed: but there would be great difficulty in giving full effect to this principle, if at the same time the validity of the contract, which must depend upon the capacity of the person, was to be governed, not by the *lex loci contractus*, but by that of the domicil (*s*).

Christinæus states a case which directly involves the application of the *lex loci contractus* to the question of majority.

(*p*) Schrassert. Obs. 210, p. 327.
(*q*) Huber Prælect. tom. 2, p. 539.
(*r*) Ibid.
(*s*) 2 Kent Com. s. 39, p. 454, 458.

"Item in decisoriis causæ inspicitur consuetudo loci contractus, sic si in loco contractus minor nequit restitui, inspiciendum erit illud statutum nec poterit per judicem causæ inceptæ restituti, etiamsi ex statuto ibi posset restitui, nisi peteretur restitutio ex læsione postea energente ex præscriptione" (*t*).

His opinion is supported by that of Bartolus. "Quis vult petere restitutionem ex læsione contingente in ipso contractu tempore contractus et inspicimus locum contractus; aut ex læsione contingente post contractum ex aliis negligentiis ut mora et inspicimus locum ubi est mora illa contracta" (*u*).

Grotius, in treating of the ages of majority, and of promises made by minors, and which the laws declare void, observes, "Leges civiles justa ratione motæ quasdam promissiones pupillorum ac minorum irritas pronunciant. Adversus quasdem restitutiones beneficium introducunt; sed hi effectus sunt proprii legis civilis, ac proinde cum jure naturæ ac gentium nihil habent commune; nisi quod quibus locis obtinent; ibi eas servari etiam naturale est. Quare etiam si peregrinus cum cive paciscatur, tenebitur illis legibus: quia qui in loco aliquo contrahit, tanquam subditus temporarius legibus loci subjicitur" (*v*).

Emérigon follows Grotius, and adopts his very language. "A stranger," says he, "who contracts in the territories of a state is held as a temporary subject of the state, subject to the laws thereof." "L'Etranger qui contracte, dans les terres d'un état, est tenu, comme sujet à temps de cet état, de se soumettre aux lois du pays" (*w*).

Lord Stowell has expressed the same opinion, in the case of *Dalrymple* v. *Dalrymple*. It is an indispensable rule of law,

(*t*) Christinæus Decis. vol. 1, Decis. 183, p. 355.
(*u*) Boullenois, tom. 2, tit. 4, c. 2, Obs. 46, p. 456.
(*v*) Grotius, b. 2, c. 4, § 2, p. 244.
(*w*) Story's Confl. p. 368.

as exercised in all civilised countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts in that country. If he rashly presume to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation which the law would impose upon him by virtue of that engagement (*x*).

The decisions in the Courts of England, Scotland, and the United States, adopt the *lex loci contractus.*

In an action brought in England to recover a sum of money advanced to an infant in Scotland, to prevent his being arrested there, Lord Eldon considered, that the question whether his infancy furnished a defence to the action depended on the law of Scotland (*y*).

This doctrine promotes, whilst that to which it is opposed is inconsistent with those principles of mutual convenience which recommend the recognition of foreign laws. The obstacles to commercial intercourse between the subjects of foreign states would be almost insurmountable if a party must pause to ascertain, not by the means within his reach, but by recourse to the law of the domicil of the person with whom he was dealing, whether the latter has attained the age of majority, and, consequently, whether he is competent to enter into a valid and binding contract. If the country in which the contract was litigated was also that in which it had been entered into, and if the party enforcing it were the subject of that country, it would be unjust, as well as unreasonable, to invoke the law of a foreign state for the benefit of the foreigner, and to deprive its own subject of the benefit of the law of his own state.

(*x*) Dodson's Rep. of Dalrymple *v.* Dalrymple, p. 9.

(*y*) Male and Roberts, 3 Esp. Cas. 163. Ex parte Otto Lewis, 1 Ves. 298.

It has been hitherto assumed that, according to the law of the domicil, the person was a minor, and incapable of contracting, although he had attained the age which *in loco contractus* constituted majority, and where, according to that law, he was competent to contract. In such a case it has been submitted, that the *lex loci contractus* ought to be followed. It ought also to be followed if the converse of that case occurred, and he had attained majority according to the law of his domicil, but was a minor according to that which prevailed in *loco contractus*. It is true, in the latter case, the party was subject to no greater liability than he would have incurred in the place of his domicil; but if the principle be correct, that the *lex loci contractus* ought to determine the validity of a contract, when that validity depends on the capacity of the contracting party, it must be uniformly applied, whether the law prevailing in the domicil be that which capacitates or incapacitates. It would not be reasonable that two different laws should be applied to one and the same contract, and that the liability of one of the parties should be decided by the *lex loci contractus*, and that of the other by the *lex loci domicilii*.

The law of France has prescribed the rule which her tribunals are to adopt when such a conflict arises. According to the Code Civil, her laws relative to the civil *status* and capacity of persons bind French subjects even if they are residing in a foreign county. "Les lois concernant l'état et la capacité des personnes regissent les Français même residant en pays étrangers" (*z*).

The acts by tutors or curators, as well as of mandatories and agents, the powers and authorities which they possess, the rights and emoluments to which they are entitled, and the manner in which they should account, must be considered with reference to the law of the place in which they administer

(*z*) Art. 3.

or act. In that place, they perform the contracts or *quasi* contracts into which they have entered, and the law of that place governs the performance (*a*).

The capacity or incapacity of a married woman to enter into the contract must be determined, it is conceived, by the law of her husband's domicile.

According to the doctrine held by all jurists, the wife retains the incapacity to which she was subject by the law of the husband's domicile, and, therefore, the validity of an obligation in respect of her capacity, and of the nature of her authority to be given by the husband to enable her to act, must be determined by that law, and not by the law of the place in which the obligation was contracted.

Rodenburg's language is, "Uxores domi sub maritorum potestate ita constitutæ, ut sine iis nec alienent nec contrahant, nullibi locorum hanc incapacitatem exuunt. Cum mulieris contra juri scripto obnoxiæ contractus, apud nos celebratus, consistat omnimodo" (*b*).

Boullenois adopts this opinion. "Quand la loi du lieu du contrat porte des dispositions qui ne viennent pas de la propre nature du contrat, mais qui ont leur fondement dans l'état et condition de la personne, il faut suivre la loi qui régit la personne, et dont cet état dépend.

"C'est par cette distinction que Mævius, décide l'espèce que nous venons de rapporter. Ratio patet tum quia non ex contractu mariti uxoris nascitur obligatio, sed ex societate conjugali, et statuto non informante contractus maritales, tum quia maritus contrahendo, foro et statutis se subjicit, quoad contractum, non autem mulierem insontem sine facto suo ad alias quâm domicilii leges obligare valet; tum denique

(*a*) P. Voet de Stat. § 9, c. 2. Munoz de Escobar, c. 27, n. 48.
(*b*) Rodenburg de Jure, &c. tit. 2, c. 1, n. 1.

quod in illo loco nulla actio contra uxorem intentari potuit, ergo nec executio" (*c*).

Pothier concurs in it. "Les lois, qui réglent les obligations des personnes, telle qu'est le Velléien qui ne permet pas aux femmes de s'obliger pour autrui, sont des statuts personnels, qui exercent leur empire sur toutes les personnes qui y sont soumises par le domicile qu'elles ont dans le territoire, en quelque lieu que soient situés les biens de ces personnes, et en quelque lieu qu'elles contractent. C'est pourquoi, si une femme domiciliée en Normandie se rendait caution pour quelqu'un, quoique l'acte du cautionnement fût passé à Paris, où le Velléien est abrogé, le cautionnement serait nul.

"Mais quoiqu'une femme ait été mariée en Normandie, si son mari a transféré son domicile à Paris, cette femme ayant cessé, par cette translation de domicile, d'être soumise aux lois de Normandie, les cautionnemens, qu'elle contractera depuis cette translation de domicile, seront valables" (*d*).

The propriety of leaving to the decision of the law of the husband's domicile the validity of the wife's obligations, when it depends on her capacity to contract them, is founded on those considerations of public policy and general convenience, which have established as part of *jus gentium*, the rule, that the validity of the marriage is to be determined by the law of the country in which it has taken place. It is more consistent with reason, as well as convenience, that the personal capacities resulting from the *status* should continue to be those which are attached to it by the law of the country where the parties have a permanent residence, than that they should be subject to be varied, when the parties had casually, and for a temporary purpose, visited a country where a different law prevailed.

(*c*) Boull. tom. 2, tit. 4, c. 2, Obs. 46, p. 467.
(*d*) Pothier Traité des Obligations, part 2, c. 6, § 3, n. 389.

There is little inconvenience in requiring that a person who deals with a female, who, from her sex, may be a married person, and subject to certain disabilities, should inquire whether she be married, and what is the degree of disability to which her coverture subjects her. If he does not by inquiry, satisfy himself that no such disability exists, as will prevent her from contracting with him, it will be the effect of his own neglect, if his contract should be rescinded.

If it were a rule, that the capacity of the wife was to be decided by the law of the country in which she contracted, it must prevail, whether the husband accompanied his wife, or whether he was still remaining in his own domicile, and had given no sanction to her to resort to another country. The consequences which would then result from it, would be repugnant to the respective rights of the parties. To permit her, during her absence from him, to enjoy a more ample capacity than is conferred by the law of his domicile, is to give her a *status* distinct from that of her husband, a capacity different from that which she possesses under that law, and to abridge the authority of the husband.

Even if the capacity of the wife were more restricted *in loco contractus*, there would still be a great objection to the relaxation of the rule.

The wife can have no other domicile than that of her husband, and, whilst he retains it, her incapacities as well as his authority, are subject to the law of that domicile. Her capacity could not be *restricted* without enlarging his authority, and thus his *status*, and the authority incident to it, would be effected by a law to which he is not subject.

SECTION III.

AS TO THE MANNER AND FORM IN WHICH IT IS CONSTITUTED.

The doctrine of all jurists that the *lex loci contractus* must be adopted in deciding on the manner and form essential to the constitution of the contract.—Instances in which this position is illustrated.—Stamps.

THE manner in which the contract is constituted is one of the *solemnia* of the contract, and its validity depends on the *lex loci contractus.*

Jurists treat as the *solemnia* of the contract whatever formality or ceremony, either as to the time, or place, or manner of making the contract, or as to its form, as whether by parol or in writing, its attestation or authentication, and which the law renders essential to the perfection and validity of the contract, and requires to be observed as the condition on which it recognizes the existence of the contract. They concur in holding that the validity or invalidity of the contract, so far as it depends on the forms and solemnities, is governed by the law of the place in which the contract is made.

Dumoulin first states what he considers included in the form of the contract. "Quandocumque lex vel statutum præscribit aliquem modum, ad faciendum actum, ille modus dicitur forma." He then adds, "Una quæque civitas, habens jurisdictionem potest per statutum facere aliquam formam contractus quæ si non servetur, contractus non valeret" (*e*). Burgundus says, "In scripturâ instrumenti solemnitatibus et ceremoniis, et generaliter in omnibus quæ ad formam ejusque

(*e*) Dumoulin ad Cod. lib. 4, tit. 44. 1 Boullenois Tr. des Stat. tit. 2, c. 3, Observ. 23. Cod. lib. 8, tit. 49, l. 1. Bartolus ad Cod. 1 Cunctos Populos, n. 13.

perfectionem pertinent spectanda est consuetudo regionis ubi fit negotiatio" (*f*). "Conditio loci et temporis perfectionem formæ quoque respiciunt, et ideo à regione contractus pariter diriguntur" (*g*). Hertius thus states the rule: "Si lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei sitæ; id est, si de solemnibus quæratur, si de loco, de tempore, de modo actus, ejus loci habenda est ratio, ubi actus sive negotium celebratur. Regula hæc apud omnes, quantum quidem sciam est indubitata." These jurists are followed by P. and J. Voet (*h*).

Thus if the law of the country where the contract is made, annuls it, if it be made on a Sunday, or in a particular place, as a prison or tavern, a contract made in that country, in contravention of such law, would be void, in whatever country it was sought to be enforced (*i*).

The 54th Article of the Ordinance de Moulins did not recognise a contract if the subject of it exceeded in value one hundred livres, unless it was reduced to writing (*j*). A contract where the amount exceeded that sum, made in France, could not be recognised unless it were in writing (*k*).

But if it were made in England, though not reduced into writing, it would be admitted in France to be proved by

(*f*) Burgundus, Tr. 4, n. 9; Tr. 5, p. 450. Boull. ib. tit. 4, c. 2, Obs. 46.

(*g*) Boullenois, ib. p. 451.

(*h*) Hert. de Coll. Leg. sect. 4, § 10, p. 126. Carpz. p. 3, c. 6, d. 12, n. 4, 5, et lib. 5, Resp. 1. F. Hottoman, Cons. 52. P. Voet, § 9, de statut. n. 9. Mævius, part 1, dec. 163, n. 6. Matth. de Afflict. d. 695. J. Voet, ad Pand. lib. 1, tit. 5, n. 13.

(*i*) Boullenois, tom. 1, tit. 2, c. 3, Obs. 23, p. 491. M. Pollet Arrêts du Parlement de Flandres, part 2, c. 31. Arrêt du, 21 Oct. 1730, du Parlement de Dijon Comment. de M. de P. Bouhier, c. 33, n. 15,

(*j*) Danty, Tr. de la Preuve, p. 49, n. 11.

(*k*) Ibid.

witnesses, notwithstanding the subject-matter of the contract exceeded one hundred livres (*l*).

On the other hand, if the contract had been made in France between two Englishmen, it would not have been admitted in evidence in the Courts of France, nor would they have given effect to it (*m*).

But if two Englishmen had made in France this contract, as it would have been valid and admissible in evidence according to the law of England, it would be sustained by the Courts in England (*n*). "Si actus inter duos celebretur, *e. g.* pactum et uterque paciscens sit exterus et unius civitatis cives dubitandum non est, actum à talibus secundum leges patriæ factum in patriâ valere" (*o*).

If, therefore, an Englishman had made such a contract in France with a Frenchman, he becomes subject to the law of France, in respect to the manner of contracting (*p*).

A contract of guarantee made in England, upon which, under the provisions of the Statute of Frauds, no action or suit could be maintained, would also be inoperative and void in every other country.

The manner in which a contract is required to be authenticated by a notary, is another solemnity governed by the *lex loci contractus*.

An example is cited by Boullenois, of a statute which required that a notary should expressly state in the instrument or contract, the place or parish where it was made, and that if

(*l*) Danty, ibid. p. 49.

(*m*) Ibid.

(*n*) Ibid.

(*o*) Godefroi. Inst. l. 20, lib. 1, tit. 2. Hertius de Coll. Leg. § 10. P. Voet de Stat. sect. 9, c. 2, n. 9; 2 Boull. Obs. 46, p. 459, 543. Target's opinion on the Will of the Duchess of Kingston, 1 Coll. Jur. 323.

(*p*) Ibid.

he omitted to comply with this direction, the contract or instrument should be null and void. A contract made in the place where this statute prevailed, omitting the designation of the place and parish, would also be void whenever it was sought to be enforced.

The law of Scotland, in all personal obligations and contracts, and in the disposition of moveables, gives to them, and to the solemnities attending their execution, all the effect which belongs to them by the law of that country where the obligation or disposition is made (*q*).

Sealing, by the law of England, is essential to a deed. An action was brought in the Court of Common Pleas on a bond executed in Jamaica. There was no seal, but a mark made in the place where the seal would be usually affixed. Evidence was admitted at Nisi Prius, by the Judge, of the custom prevailing in Jamaica to substitute this mark for the seal. The Court afterwards granted a rule nisi for setting aside the verdict, on the ground of this evidence having been admitted. In consequence of a compromise by the parties, no decision was given on this point (*r*).

A similar case occurred at New York. An instrument for the payment of money, executed in Virginia, with an L. S. after the name of the maker, was in that state regarded as a sealed instrument. The instrument in question having this mark, was made payable in New York, and a suit having been brought on it in the latter State, it was held that it could only be considered as a negotiable note, or simple contract, and that an action could not be sustained (*s*).

(*q*) Erskine, b. 3, tit. 2, § 40, January 19, 1610. Fortoun *v.* Shewan, Dict. 4429, Nov. 15, 1626. Galbraith *v.* Cunningham, Dict. 4430, Feb. 15, 1630. Harper *v.* Jeffrey, Dict. 4431, July 5, 1673. Master of Saltoun *v.* Lord Saltoun, Dict. 4431. Countess of Findlater *v.* Earl of Seafield, Feb. 8, 1814, F. C.

(*r*) Adam *v.* Kerr, 1 Bos. & Pul. 360.

(*s*) Warren *v.* Lynch, 5 Johns. Rep. 239.

If the law of the place in which the contract is made requires that a certain stamp or duty should be imposed on it to give it effect, and render it the foundation of a suit, it would seem to follow, that if it wanted the required stamp, the Court of any other country would, on proof of the foreign law, refuse to give effect to the contract (*t*).

There have been some decisions in the Courts of England, which have refused to give effect to the stamp laws of a foreign country (*u*).

When a contract is made in one country for payment of money in another country, and, by the laws of the latter, a stamp is required to make the contract valid, and it is not by those of the former, it has been held that a stamp is not required in such a case to give validity to the contract, upon the ground, that an instrument, as to its form and solemnities, is to be governed by the *lex loci contractus*, and not by the law of the place of payment; and that, therefore, a stamp is not required (*v*).

In the application of these principles, care must be taken to distinguish between those formalities which, besides being essential to the constitution, are used as evidence of that constitution. The nature of the evidence by which the contract is proved, belongs "ad ordinatoria litis," ad ordinationem judicii, ad ordinationem et calculationem litis, and must be that which is required by the *lex loci fori*.

Si de probationibus et quidem testibus; sic eas adhibebit, sic examinabit hosce prout exigit forum judicis ubi producuntur. Si de instrumentis; sic exhibenda, sic edenda, ut fert loci

(*t*) Alves *v.* Hodgson, 7 T. R. 241. Snaith *v.* Mingay, 1 M. & S. 87. Clegg *v.* Levy, 3 Camp. 166.

(*u*) Wynne *v.* Jackson, 2 Russ. 351. James *v.* Catherwood, 3 D. & R. 190.

(*v*) Mr. Justice Martin, in Vidal *v.* Thompson, 11 Martin's Rep. 23-25.

statutum ubi exhibentur, vel eduntur (*w*). The generality of these expressions must lead us to the conclusion, that Voet was of opinion that the modes of proof and the law of evidence of the *lex fori*, ought to regulate the proceedings in all suits, whether these suits arose from foreign contracts, or instruments, or other acts or not.

Bouhier states a case where a suit was brought in France, by an Englishman, against another person for money supposed to be lent by him to the latter; and he offered proof thereof by witnesses. It was objected, that by the Ordinance of Moulins (Art. 54), such parol proof was inadmissible. But the Court admitted it upon the ground, that the law of England, where the contract was made, admitted such parol proof, and therefore it was admissible in a controversy on the contract in France. Bouhier holds the decision to be correct, if the contract was made, as he supposes it to have been, in England (*x*).

Generally speaking, it seems true, that neither the *lex loci contractus*, nor the *lex loci domicilii*, is applicable to the course of procedure, but the course of procedure ought to be according to the law of the forum where the suit is instituted (*y*).

The admission of evidence, and the rules of evidence, are rather matters of procedure, than matters attaching to the rights and titles of parties under contracts, deeds, and other instruments; and therefore they are to be governed by the law of the country where the Court sits (*z*).

"What evidence the Courts of another country would

(*w*) P. Voet de Stat. § 10, c. 9, n. 10, p. 287. Ibid. p. 347. 3 Comm. For. & Col. Law, 673.

(*x*) Bouhier Cout. de Bourg. c. 21, § 205, p. 415. See also Strykius, tom. 2, Diss. 1, c. 3, § 18-25, pp. 21, 27.

(*y*) See Yates *v.* Thomson, 3 Clark & Fin. Rep. 577, 580. Don *v.* Lippmann, 5 Clark & Fin. Rep. 1, 14-16.

(*z*) Lord Brougham, in Yates *v.* Thomson, 3 Clark & Fin. 577, 580.

receive, and what reject, is a question into which I cannot at all see," says Lord Brougham, "the necessity of the Courts of any one country entering. Those principles, which regulate the admission of evidence, are the rules by which the Courts of every country guide themselves in all their inquiries. The truth, with respect to mens' actions, which forms the subject-matter of their inquiry, is to be ascertained according to a certain definite course of proceeding, and certain rules have established that, in pursuing this investigation, some things shall be heard from witnesses, others not listened to; some instruments shall be inspected by the Judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever be the subject-matter of investigation. Nor can it make any difference whether the facts, concerning which the discussion arises, happened at home or abroad; whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well might it be contended that another mode of trial should be adopted, as that another law of evidence should be admitted in such cases" (*a*).

SECTION IV.

OF THE INTERPRETATION OF THE CONTRACT.

Its interpretation governed by the *lex loci contractus*.

THE words and phrases used in contracts have different meanings attached to them in different countries, either by law or usage. When the intention of the parties cannot be

(*a*) 3 Clark & Fin. 577, 580.

collected from the language which they have used in their contract, or when the language admits of two constructions, that must be adopted which is given by the law or custom of the country in which the contract is made.

Quando verba sunt dubia et ambigua, tunc *inspicimus*, quod verisimiliter à contrahentibus actum sit, aut quid testator senserit (*b*).

Where the terms of an instrument, executed by foreigners in a foreign country, are free from obscurity, it will be construed according to the obvious import of those terms, unless there is some proof that, according to the law of the foreign country, the true interpretation of them would be different (*c*). But where a particular interpretation is established, that must be followed. Indeed, the Court of every country must be presumed to be the best expositors of their own laws, and of the terms of contracts made with reference to them. And no Court would assume the power to declare, that a foreign Court misunderstood the laws of their own country, or the operation of them on contracts made there (*d*).

But where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its interpretation, is to be governed by the law of the place of performance (*e*).

(*b*) J. à Sandè, Op. Comm. de Reg. Juris. l. 9, p. 17.

(*c*) King of Spain *v.* Machado, 4 Russ. Rep. 225, Story's Conf. § 286.

(*d*) Mr. Chief Justice Marshall, in Elmendorf *v.* Taylor, 10 Wheaton's Rep. 159. Mr. Justice Porter, in Saul *v.* His Creditors, 17 Martin's Rep. 587.

(*e*) 2 Kent. Comm. sect. 37, pp. 393, 394, and lect. 39, p. 459 (3rd ed.) Casaregis, Disc. 179; 1 Emerigon, c. 4, § 8. P. Voet de Stat. § 9, c. 2, § 15, p. 270. Ibid. p. 328. Boullenois Quest. Contr. des Lois, p. 330, &c. 3 Comm. on Col. and For. Law, p. 2, c. 20, pp. 771, 772. Don *v.* Lippman, 5 Clarke & Fin. Rep. 1, 13, 19.

It follows from the principle already stated, that in the interpretation and construction of the contract that resort must be had to the law or usage of the country in which the contract is made. "Semper in stipulationibus, et in cæteris contractibus, quid actum est, erit consequens, ut id sequamur quod in regione in quâ actùm est, frequentatur" (*f*). The *lex loci contractus* governs.

The annotators on Duplessis, M. Berroyer, and De Laurière, say, "C'est donc un maxime indubitable, que quand il s'agit de l'execution ou de l'interpretation d'un contrat, il faut avoir recours à la coutume du lieu où il a été passé" (*g*). It has been stated that this is the prevailing opinion of jurists, and that it is generally adopted by the judicial tribunals of England and America (*h*), but Dumoulin, who is followed by Bouhier and Boullenois, strongly objects to its universal adoption. In his opinion, the place of contract is only to be considered as a circumstance from which evidence of the intention of the parties may be inferred. That evidence is strong in favour of the *lex loci contractus*, when either party resorts thither for the purpose of buying or selling. "Quia tunc præsumitur inquisivisse morem loci per locum à communiter accidentibus, qui est rabidus in materiâ conjecturali" (*i*).

So if either party is a citizen of the state in which the contract is made (*j*): "Quia sibi debet imputare, quod non expressit consuetudinem sui fori exteri, si ea volebat uti" (*k*).

(*f*) Dig. lib. 50, tit. 17, l. 34; lib. 21, tit. 2, l. 1, l. 6, and lib. 22, tit. 1.

(*g*) 1 Duplessis, p. 152.

(*h*) Com. For. & Col. Law, vol 2, p. 860. Poth. Tr. des Oblig. n. 94. Merlin, tit. Convention, § 7. Code Civil, Art. 1159. Toull. liv. 3, tit. 3, des Cout. n. 319, *et seq*. Machado *v*. King of Spain, 4 Russ. 225; 3 B. & Ad. 732. Story's Conf. 219. Thimbey *v*. Vignier, 1 Bing. N. S. 159.

(*i*) 3 Molin. Op. lib. 1, tit. 1, p. 554.

(*j*) Hertius de Coll. Leg. § 10. Com. For. & Col. Law, vol 2, p. 860. Story's Conf. ib.

(*k*) Ibid.

But if both parties were foreigners it would seem, that they must be presumed to contract according to the law of the country with which they are acquainted, namely, that of the place of their domicile, and not according to the law of the place with which they are unacquainted. This distinction does not appear to be sanctioned (*l*).

By the law of England, a month means ordinarily in common contracts, as in leases, a lunar month; but in mercantile contracts it means a calendar month. A contract, therefore, made in England for a lease of land for twelve months would mean a lease for forty-eight weeks only (*m*). A promissory note to pay money in twelve months would mean one year or twelve calendar months (*n*).

Thus the term *usance*, which in some countries means a month, in others means two or more months, and in others half a month. A note payable at one usance must be construed every where according to its meaning in the country where the contract is made (*o*).

Boullenois, while he admits the general propriety of the rule *locus contractus regit actum*, contests its universality (*p*).

(*l*) Huber, lib. 1, tit. 3, § 2. Grotius, b. 2, c. 11, § 5. Casareg. Disc. 179, n. 50. Emerigon, Disc. c. 4, § 8, p. 124, 125. Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hag. Rep. 58. Pardessus Droit de Comm. tom. 1, Art. 191, tom. 5, Art. 1491. Elmendorf *v.* Taylor, 10 Wheaton's Rep. 159. Saul *v.* His Creditors, 5 Martin's N. S. 587; Story's Conf. 228.

(*m*) Wigglesworth *v.* Dallison, Doug. 201, 207. Webb *v.* Plummer, 2 B. & Ald. 746; 2 Black. Com. 141. Catesby's Case, 6 Rep. 62. Lacon *v.* Hooper, 6 T. R. 224.

(*n*) Lang *v.* Gale, 1 M. & Sel. 111. Cockell *v.* Grey, 3 Bro. & Bing. 197. Leffingnell *v.* White, 1 Johns. Cas. 99.

(*o*) Depau *v.* Humphries, 20 Martin, 1, *et seq.* Morris *v.* Eves, 11 ibid. 730. Courtois *v.* Carpenter, 1 Wash. Cir. Rep. 376; Story's Conf. 226, 227.

(*p*) 2 Boullenois Obs. 46, pp. 454, 489, 490.

He seems to think, and some other jurists have adopted the same opinion, that where a contract is made between foreigners belonging to the same country, who are not domiciled, but merely transient persons in the place where the contract is made, it ought to be governed by the law of their own country; and that this rule of the place applies, *à fortiori*, where they are ignorant of the laws of the place where the contract is made (*q*).

Without undertaking to say that the exception may not be well founded in particular cases, as to persons merely *in transitu*, it may unhesitatingly be said, that nothing but the clearest intention on the part of foreigners to act upon their own domestic law, in exclusion of the law of the place of contract, ought to change the application of the general rule (*r*).

And, indeed, even then, if the performance of the contract is to be in the same country where it is made, it seems difficult, upon principle, to sustain the exception. Huberus has applied the same rule to those who are domiciled, and to those who are merely commorant in the place of the contract;—that the law of the place of the contract is to govern (*s*).

Grotius has also affirmed the doctrine in a general form. "If," says he, "a foreigner makes a bargain with a native, he shall be obliged by the laws of his state; because he who enters into a contract in any place, is a subject for the time being, and must be obedient to the laws of that place." Quare etiamsi peregrinus cum cive pasciscatur tenebitur illis legibus; quia qui in loco aliquo contrahit, tanquam subditus temporarius legibus loci subjicitur (*t*). Emerigon follows Grotius, and

(*q*) 2 Boull. pp. 455-456. Ibid. pp. 495-497, 501-503, and notes.

(*r*) See Pardessus Droit. Comm. n. 182, 191; Emerigon, c. 4, § 8. Story's Conf. 273.

(*s*) Huberus, lib. 1, tit. 3, §2, 3, Story's Conf. § 261, note. See Livermore's Diss. p. 46, § 42.

(*t*) Grotius, lib. 2, c. 11, § 5, n. 2.

adopts his very language. "A stranger," says he, "who contracts in the territories of a state, is held as a temporary subject of the state, subject to the laws thereof." L'étranger qui contracte dans les terres d'un état, est tenu comme sujet à temps de cet état, de se soumettre aux lois du pays (*u*).

(*u*) Emerigon Assur. c. 4, § 8, tom. 1, pp. 124, 125. See also Casaregis Disc. 179, n. 60, 62.

BOOK II.

EXTINCTION OF THE OBLIGATION OF THE SURETY.

PURSUING the order adopted by the learned jurist to whose writings frequent reference is made (*a*), it is proposed to treat of the various modes by which the extinction or discharge of the obligation of the surety is effected. It is effected, 1st, either by the terms of the contract itself; 2ndly, by the acts to which both the creditor and surety are parties; 3rdly, by the acts of the creditor, to which the surety is no party; 4thly, by fraud or mistake; 5thly, by the operation of law. Under the first of these heads are those cases in which the obligation would be at an end, because the period for which the liability of the surety was to be restricted had expired, or because the creditor had not performed a condition expressed or implied, which was imposed upon him by the terms of the contract of suretyship. Under the second and third of these heads are to be considered—Extinction by Payment; Consignation and Tender; Compromise; Release; Novation; Delegation; Compensation; Extension of time; Alteration of the contract; Fraud; Mistake: and, under the fifth of these heads, Confusion; Prescription, and Bankruptcy.

It will then remain to be considered, if there should be a conflict between the "*lex loci fori*," and the "*lex loci contractus*," as to the modes of extinction, which of these laws should be adopted.

(*a*) Hering. de Fidejuss. c. 20.

BOOK II.

CHAPTER I.

THE EXTINCTION OF THE OBLIGATION—FROM ITS NATURE AND TERMS.

SECTION I.

The time of the duration of the surety's liability having expired.—When it is expressly limited.—When it is impliedly limited.—A surety for a tenant for a term of years.—A clerk for a defined period of service.—An officer whose term of office is by law or usage limited.—A change in the constitution of the office.—A clerk whose original employment is changed, in consequence of the change of the persons in whose employment he remains.

THE obligation of the surety will cease when the period of time, to which his responsibility is by the contract limited, has expired, and there has been during that period no act or default by the principal for whom he was responsible (*a*). Vinnius, whilst he holds that the mere extension of the time of payment without the consent of the surety, will not discharge him, adds, "Non enim tempus in obligatione fidejussoris, appositum est ad finiendam aut limitandam obligationem, quo casu aliud dicendum esset, respectu periculi sequentis temporis" (*b*).

That period may be fixed either expressly by the contract between the creditor and principal, as in the case of a surety for a tenant for a certain term of years; or for the fidelity of a clerk or servant, during his employment for a defined period. Or, the period of responsibility may be limited in

(*a*) Hering. de Fidejuss. c. 20, s. 18.

(*b*) Vinn. Sel Quæst. c. 42. Coler de process. execut. p. 1, c. 10, n. 2, 98, *et seq.*

consequence of the office to which the principal is appointed, and for whom the surety has undertaken, being either by positive law or usage limited in its duration. In these and similar cases, when the term of years, or the defined period of service, or the time for holding the office has expired, and there has been during that period no act or default by the principal, the obligation of the surety is extinct.

The surety of a tutor is not responsible for the acts of the latter after the guardianship has ended *quæ sponte suâ gesserit* (*c*).

In treating of the interpretation of the contract of suretyship several instances have been mentioned where the hiring by the tenant, the service of the clerk, and the duration of the office, which had been the subjects in respect of which the surety had undertaken for the tenant, the clerk and the officer had been only for a limited period, and where the liability was under the contract restricted to the period so limited (*d*). It will be sufficient here to refer to those instances. It should be observed, that the office may cease, not only by the effluxion of the time during which it was expressly mentioned that it was to be holden, or during which according to law or usage it was holden; but there may be such an alteration in the constitution of the office, that it may cease to be that, in respect of which the surety became bound for the principal.

An indemnity given to certain persons and their successors, as the governors of a voluntary unincorporated society, ceases upon the society's becoming incorporated (*e*); for in the judgment of the law, the society is, after the charter of incorporation, a perfectly new body of persons. The individual members are liable for debt in the one case, and

(*c*) Montanus de Tutelis, c. 39, n. 255. Dig. lib. 26, tit. 7, l. 46, § 34.
(*d*) See *supra*, p. 63, and seq.
(*e*) Dance *v.* Girdler, 1 N. R. 34.

only the corporation funds in the other; and it is reasonable to suppose that a surety may be willing to give his security when the governors were personally responsible, and therefore the more likely to look after the conduct of persons in their service, although his fidelity had been guaranteed, than would be the case, if they were not responsible.

The clerk's employment, which was the subject of the surety's contract, may cease to be that to which the contract related, because the persons in whose service the clerk continues, may no longer be the same as those into whose employment he entered at the time of the contract. The surety's liability is at an end upon the retirement or death of either of the parties composing the firm into whose service the clerk entered at the time of the surety's contract, or by the introduction of any other person into the firm, unless, indeed, the contract was so expressed as to extend the liability of the surety for the clerk's conduct in the firm whatever changes might take place. The cases illustrating this proposition have been already stated, in treating of the interpretation of the contract (*f*).

SECTION II.

The non-performance by the creditor of a condition imposed on him.—The condition on which the surety consented to become responsible must be strictly performed.

If the contract of the principal for which the surety undertook was subject to a condition which has not been performed, or if the contract of suretyship is as between the creditor and the

(*f*) See *supra*. p. 63, and seq.

surety, subject to a condition, the surety is discharged if that condition be not performed.

"Atque adeò fidejussionis præstitæ sub conditione dies non dicitur venisse, nec celsisse ante purificationem conditionis... fidejussor conditionaliter accedeus, non aliter tenetur, quàm si conditio adimpleatur" (*g*).

If the creditor omit to perform any condition, express or implied, imposed upon him by the guaranty, the surety will, be exempted from liability (*h*).

Under a guarantee against any loss in case the defendant's son should become bankrupt, the party giving it will not be liable upon the proof merely of the circumstances requisite to support a commission of bankruptcy, if no such commission has been actually sued out against the son (*hh*).

Under a guarantee to pay when a collateral contract of some third person is finished, and the amount of that contract is paid, it seems that unless that contract is completely performed the sureties are not liable (*i*). But where C. & Co., before their bankruptcy, had guaranteed to A. the payment of 300*l.* for the erection of a sugar mill for D., on the production of a certificate from the engineer that the mill was erected according to the terms of a certain specification, and A. produced a certificate of the erection of the mill, stating, however, a deviation from the original plan, with the consent of D., upon which C. & Co., without making any objection to such deviation, informed A. that it was not in their power to pay

(*g*) Hering. de Fidejuss. c. 20, s. 8.

(*h*) Glyn *v.* Hertel, 8 Taunt. 208. Bacon *v.* Chesney, 1 Stark. N. P. C. 192, per Lord Ellenborough. Holl *v.* Hadley, 5 Bingh. 54. Evans *v.* Whyle, 5 Bingh. 485. Bulkeley *v.* Lord, 2 Stark. 400. Elworthy *v.* Maunder, 5 Bingh. 295.

(*hh*) Bulkeley *v.* Lord, 2 Stark. 406.

(*i*) Hemming *v.* Trennery, 2 C., M. & R. 386; 1 Gale, 206; 5 Tyr. 587, 1 Jur. 893.

the money, it was held, that A. might prove the 300*l.* under the fiat issued against C. & Co. (*i*).

Where a bill of exchange was drawn by C. in England on P. in India, payable sixty days after sight, and a bond was entered into by S., conditioned to be void if the bill should be paid in India, or paid in England by the obligor, within thirty days after the bill should be produced to him after being sent back here duly protested for want of payment, and the bill was transmitted to India, and when it arrived there the drawee had left the place, and his agent refused to accept it, and the bill was then protested in India for non-acceptance, and sent back to England so protested, it was held by the Court of King's Bench, (overruling the same case in the Court of Common Pleas,) that notwithstanding all the care that could be taken had been taken to enforce the payment of the bill by C., from P. in England, after it had been so returned, and had been presented to him, and protested for non-payment *here*, and notwithstanding there was no reasonable expectation of any person being in India during the sixty days after it had been so protested for non-acceptance, who would have paid the bill at the end of that time, yet, inasmuch as the conditions upon which S., when applied to had consented to add his security to that of the bill, and for which, on entering into that security, he expressly stipulated, had not been complied with, the surety was not liable (*j*).

So in a case where A. contracted to let, and B. to take the milking of thirty cows at the sum of 7*l.* 10*s.* per cow, per annum, the benefit of which was to enure to B., but C., as B.'s surety, stipulated that he would pay the rent, and it was afterwards agreed between A. and B., (the latter having then thirty-two cows,) that A., instead of taking away two cows at

(*i*) Ex parte Ashwell, 2 Deac. & Chit. 281.

(*j*) Campbell *v.* French, 6 T. R. 200, overruling French *v.* Campbell, 2 H. Blk. 162.

that time, should be at liberty to take four at the fall of the year, and accordingly A. did, at the fall of the year, take away four cows, leaving B., after that period, less than thirty: it was held by Bayley and Holroyd, Justices, (Littledale, J., dissenting,) that the contract was an entire contract for the letting of thirty cows, neither more nor less: that the expression of 7*l.* 10*s.* per cow did not make the contract a divisible contract, for that had reference only to the measure of the rent, not to the nature of the contract: that A., in an action against C., was bound to prove a literal performance of the contract: that he had not done so, inasmuch as he had shewn, that during part of the year he had allowed B. to have twenty-eight cows only, and although it was proved by B. that this new agreement, as to the number of cows which he was to have from time to time, made no difference as to profit or loss, and that, during the whole period of his occupation, he had had, upon an average, the milking of thirty cows, yet, as C. had not been consulted upon the subject, and had had no opportunity of exercising his own choice and judgment in the matter, the terms of the contract had not been adhered to, and the surety C. was not liable (*k*).

So if S. engages to guarantee the amount of goods supplied by A. to B., provided eighteen months' credit be given, A. is not at liberty to give twelve months' credit only, and after the expiration of six months more to call upon C. on his guarantee (*l*).

(*k*) Whitcher *v.* Hall, 5 B. & C. 269.
(*l*) Bacon *v.* Chesney, 1 Stark. 192.

CHAPTER II.

EXTINCTION OF THE OBLIGATION BY PAYMENT.

SECTION I.

Payment.—Solutio.—Definition.—Requisites of.—By and to whom made.—Effect of as between creditor and surety.—Creditor and debtor.—Payment by the surety.—By the debtor.—Competence or incompetence of persons paying or receiving.—Loss of the money delivered by debtor to surety to pay the creditor the debtor not discharged.

1. THIS contract or obligation is extinguished and at an end by payment. In the civil law, *solutio*, according to its most comprehensive sense, included every mode by which the obligation was dissolved or satisfied. In its more restricted sense, and as distinguished from those modes of dissolving the obligation which are stated in the following sections of this book, it imports the delivery or payment of that which is due (*a*).

"Tollitur autem omnis obligatio solutione ejus, quod debetur; vel si quis consentiente creditore aliud pro alio solverit. Nec interest, quis solvat, utrum ipse, qui debet, an alius pro eo; liberatur enim et alio solvente, sivè sciente, sivè ignorante, debitore, vel invito eo solutio fiat" (*b*).

The following definition is given of the payment which would have this effect. "Sit ejus quod debetur, à se in creditorem vel alium, cui solvatur rectè, abalienatio perfecta. Solutio nihil aliud est, quam rei debitæ per ipsum debitorem vel alium, ejus nomine, creditori idoneo factam actualem

(*a*) Inst. lib. 3, tit. 30.
(*b*) Ibid.

satisfactionem" (*c*). The expression "ejus quod debetur," in the Institute and in the Commentators imports, that the extinction of the obligation cannot be effected by the payment or delivery of any other thing or subject, but that which was due, unless with the consent of the creditor.

"Nam aliud pro eo, quod debetur, invito creditore solvi non potest, ut sequatur liberatio (*d*), veluti, si pro pecunia debita certa species obtrudatur creditori, vel pro specie debita offeratur alia species aut speciei debitæ æstimatio; vel si factum pro facto solvatur. Nummi quidem in alia forma reddi possunt, nisi hoc damnosum sit creditori, sed hoc casu non intelligitur aliud pro alio solvi" (*e*).

If the payment be made by the debtor, his sureties are discharged from the debt or obligation, and on the other hand if the surety pays the creditor, and it is received by the person having authority from the creditor to receive it, not only the surety, but the debtor also, as between him and the creditor, is discharged, although the debtor will remain liable to his surety (*f*).

Payment, although in its ordinary signification only imports an act by the party making it, yet its legal signification is, an act in which the party offers, and the creditor accepts that which is offered.

"Ut itaque solutio fieri possit, necessario requiritur, ut utriusque tam præstantis, quam accipientis voluntas concurrat." Without this concurrence neither the party making the payment, nor the party receiving it acquire the dominium of that which was paid (*g*).

Hence it follows, that the persons to whom the payment is

(*c*) Hering. c. 20, p. 236.
(*d*) Dig. lib. 12, tit. 1, l. 2. Cod. lib. 8, tit. n. 3, l. 16.
(*e*) Vinnii ad Inst. lib. 3, tit. 30, p. 705.
(*f*) Hering. de Fidejuss. c. 20, § 1, n. 8.
(*g*) Dig. lib. 44, tit. 9, l. 55. Lauterb. Disp. 130, Th. 3.

made must be competent to receive, and those by whom it is made must be competent to make it. Those who have not the administration of their own estates are not competent for either of those purposes,—as minors, women under coverture, persons under interdict (*h*).

Although the creditor to whom the payment is made was a minor, &c., yet if the tutor, &c., seek to recover payment a second time, his demand will not be sustained, if the debtor can shew that the creditor has derived an advantage from the money thus paid, and that this advantage subsisted at the time of the demand: "Si quis pupillo solverit sine tutoris auctoritate id quod debuit, exque eâ solutione locupletior factus sit pupillus, rectissimè dicitur exceptionem petentibus nocere. Nam et si mutuam acceperit pecuniam, vel ex quo alio contractu locupletior factus sit, dandam esse exceptionem. Idemque et in cæteris erit dicendum, quibus non recte solvitur: nam si facti sint locupletiores, exceptio locum habebit" (*i*).

When the payment, made by a person who had not the administration of his estate, is of money or other consumable property, and the same is *bonâ fide* consumed by the creditor, the payment, by the civil law, became valid: "Pupillum sine tutoris auctoritate nec solvere posse palam est: sed si dederit nummos, non fient accipientis, vindicarique poterunt, planè si fuerint consumpti, liberabitur" (*j*).

It is considered by Touillier, that the payment by a minor or other person, not *sui juris*, of a debt justly due, was not an

(*h*) Fab. Cod. lib. 5, tit. 35, def. 1. Dig. lib. 46, tit. 3, l. 11, l. 96. Palmer *v.* Trevor, 1 Vern. 261. Voet, lib. 46, tit. 3, n. 1, 5. Poth. Tr. des Oblig. n. 495, 504. Stair, b. 3, tit. 18, § 3. Erak. b. 3, tit. 4, § 1. Comm. For. & Col. Law, vol. 3, p. 815.

(*i*) Dig. lib. 44, tit. 4, l. 4, § 4; tit. 1, l. 4, l. 47. Poth. ad Pand. lib. 46, tit. 3, Art. 3, § 8, n. 20. Comm. For. & Col. Law, vol. 3. p. 816.

(*j*) Dig. lib. 46, tit. 3, l. 14, § 8. Voet, ib. n. 6. Poth. ib. n. 499.

invalid payment, and that, neither under the former or present law of France, could such payment be recalled (*k*).

It is immaterial, as respects the extinction of the obligation, whether the debtor himself or the surety, or any stranger in their names, pays the debt (*l*).

If the surety makes a payment, owing a debt to the creditor as a principal debtor, and also a debt for which he is surety, he is presumed to have paid it on account of the former debt, and, therefore, it is to be so applied, and not to that for which he was surety. "Cum ex pluribus causis debitor pecuniam solvit, utriusque demonstratione cessante, potior habebitur causa ejus pecuniæ quæ sub infamia debetur: mos ejus quæ pœnam continet; tertio, quæ sub hypotheca vel pignore contracta est: post hunc ordinem potior habebitur propria, quam aliena causa, veluti fidejussoris; quod veteres ideo definierunt, quod verisimile videretur diligentem debitorem admonitu ita negotium suum gesturum fuisse" (*m*).

If the debtor has two sureties for two different debts, he may elect to which of the debts his payment shall be applied, and, consequently, which of the sureties he will discharge. "Si duos quis dederit fidejussores, potest ita solvere, ut unum liberet" (*n*).

If the debtor deliver to the surety the money wherewith to pay the creditor, and the surety either misapplies it, or becomes insolvent, or is robbed, the loss falls on the debtor, and not on the creditor (*o*).

(*k*) Touillier, liv. 3, tit. 3, c. 5, n. 6, *et seq.* Domat. liv. 4, tit. 8, § 3. Code Civil, Art. 711, 938, 1138, 1238, 1583.

(*l*) Hering. de Fidejuss. c. 20, §. 1, 4-9.

(*m*) Dig. lib. 46, tit. 3, p. 908.

(*n*) Ibid. p. 899.

(*o*) Hering. c. 20, § 27, n. 8.

SECTION II.

APPLICATION OF PAYMENTS.

Power of the person paying to direct in what manner it shall be applied. —Creditor cannot apply it in a different manner.—Payment by the debtor binds the surety.—Appropriation by the debtor may be implied. —Application must be declared by the debtor at the time he makes the payment.—Application by party receiving.—Whether he can make it at any time after he receives the money.—When no appropriation made by party paying or party receiving.

It is in the power of the debtor, who may be indebted to the creditor on two or more accounts, to declare to which of those accounts the sum paid by him shall be applied. "Quoties quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis, dicere, quod potius debitum voluerit solutum" (*p*). And the reason assigned is, "possumus enim certam legem dicere ei, quod solvimus" (*q*).

Thus, he may declare that he pays a sum on account of the principal of his debt, and the creditor having agreed to receive it, cannot afterwards contest such application (*r*).

If a particular appropriation have been made by the debtor, the creditor has no power to vary or alter such appropriation; if the creditor receive the payment, it must be upon such terms as the debtor will pay it (*s*). The payment by the principal binds the surety, for the latter cannot control

(*p*) Dig. lib. 4, tit. 3, l. 1.
(*q*) Ibid.
(*r*) Dig. ibid. l. 102, § 1.
(*s*) Gwynne *v.* Burnell, 2 Bing. N. C. 7. Bois *v.* Cranfield, ib.; Vin. Abr. 277, tit. "Payment," M. pl. 1. S. C. Str. 239. Anon. Cro. Eliz. 68, and see the observations of Lord King, C., in Colt *v.* Netterville, 2 P. Wms. 304.

the principal in making such application as he chooses (*t*). R. who had been appointed a tax collector, entered into a bond with B. as his surety, for the due and faithful payment to the Receiver General, according to the intent of the act of Parliament, under which he had been appointed, of all monies collected by R. upon the days and at the times required by the act. The monies received by the tax collector for the service of the year during which B. was his surety, were, as to part, paid over by him to the Receiver General to the service of that year, and the residue of the monies so received were paid by B. to the service of former years, during which time R. had also been tax collector, but B. had not been his surety during these former years. It was held, that the payments by the tax collector, for the year for which B. was his surety, to the account of different years, was a breach of the condition for due payment, and that B. was liable for the amount of such payments, and that the Receiver General was justified in applying the money according to the express directions of the tax collector, though some of those payments went in exoneration of the sureties for former years (*u*).

This rule is adopted by the law of Holland (*v*), Spain (*w*), France (*x*), and Scotland (*y*), as well as by the law of England (*z*).

The appropriation by the debtor may be implied from cir-

(*t*) Saunders *v.* Taylor, 9 B. & Cress. 35; and see Williams *v.* Rawlinson, 3 Bing. 71. S. C. 10 J. B. Moo. 362. S. C. 1 Ry. & M. 233.

(*u*) Collins *v.* Gwynne, 9 Bing. 544. Gwynne *v.* Burnell, 2 Bing. N. C. 7.

(*v*) Voet, lib. 46, tit. 3, n. 16.

(*w*) L. 10, tit. 14, part 5.

(*x*) Pothier, Tr. des Oblig. n. 565. Code Civil, Art. 1253. Toullier, liv. 3, tit. 3, c. 5, n. 174.

(*y*) Ersk. b. 3, tit. 4, § 2.

(*z*) Pinnell's case, 5 Co. 117. Colt *v.* Netterville, 2 P. Wms. 304. Clayton's case, 1 Merr. 605.

cumstances when there is no express direction by him (*a*). Thus, where A. having large demands against B. upon bill transactions with himself, and also as agent for several persons to whom B. had granted annuities secured by C. caused an attorney to make application to B. and C. on behalf of these annuitants, and B. in consequence of that application, and the remonstrances of C. the surety, paid to A. certain sums of money, without making any specific appropriation of them at the time of payment; it was held, that A. must be considered as having received them on account of the annuitants, and that the latter were entitled to have those monies divided amongst them, in proportion to the amount of their respective demands (*b*).

A. deposited with his bankers, to whom he was indebted, the promissory note of his brother-in-law, as a security for the money due to them. Before it became due, he informed the bankers that it was an accommodation note, and requested them to hold it over for some time, until a demand of his with other persons was settled; to which the bankers consented; and on the day the note became due, A. paid in *generally* a sum of money, leaving a balance due to the bankers considerably less than the sum due on the note, and A. shortly afterwards becoming insolvent, it was decided that the bankers could not fix the maker of the note as responsible for more than the balance remaining due at the time of such payment, although they afterwards trusted A. with a further sum of money (*c*).

A promissory note was given by C. as surety for flour to be delivered to B. by A., who was a dealer in flour, and at

(*a*) Peters *v.* Anderson, 5 Taunt. 596. Bosanquet *v.* Wray, 6 ib. 597. Shaw *v.* Picton, 4 Bar. & Cres. 715.

(*b*) Shaw *v.* Picton, 4 Bar. & Cres. 715.

(*c*) Hammersley *v.* Knowlys, 2 Esp. 665.

the time the note was given it was agreed that it should operate as a security for such goods as should afterwards be delivered, and not for a debt which then existed. Flour had been subsequently delivered, and sums had been paid by the person supplied. It appeared that the usual term of credit upon sales of flour was three months, and that discount was allowed accordingly; and it was held, that there was sufficient ground for inferring, in the absence of proof to the contrary, that the payments were made in relief of the surety (*d*).

But where a person is indebted on his individual security, and that a simple contract security, and where he is also indebted to the same creditor by bond, in which A. joins as a surety, and a payment is made *generally* by such debtor, it would not, without some circumstance to shew it was intended to be made in discharge of the bond, be so applied, even in favour of the surety, and though it was manifestly for the advantage of the debtor himself that the payment should be so applied (*e*).

Such also is the doctrine of the Courts in America (*f*).

The application by the debtor of the money he pays, must be declared by him at the time he makes the payment, and he cannot make the application afterwards (*g*).

A. was indebted to his creditor by specialty, and also on

(*d*) Marryatts *v.* White, 2 Stark. 101.

(*e*) Manning *v.* Westerne, 2 Vern. 606. S. C. Eq. Ca. Ab. 147, pl. 2, and see Peters *v.* Anderson, 5 Taunt. 596. Plomer *v.* Long, 1 Stark. 153. Tyson *v.* Cox, T. & Russ. 395; see Heyward *v.* Lomax, 1 Vern. 24. S. C. 1 Ec. Ca. Ab. 147, pl. 1.

(*f*) Mitchell *v.* Dale, 2 Har. & G. 159. Taylor *v.* Sandiford, 7 Wheat. 20. Niagara Bank *v.* Rosevelt, 9 Cowen, 409. Seymour v. Van Slick, 8 Wend, 403. Patterson *v.* Hall, 9 Cowen, 747. United States *v.* Kirkpatrick, 9 Wheaton, 720. Blackhouse *v.* Patton, 5 Peter's S. C. R. 161. Gwinn *v.* Whitacre, 1 Harr. & Johns. 754. Brewer *v.* Knapp, 1 Pick, 336.

(*g*) Wilkinson *v.* Sterne, 9 Mod. 427.

simple contract; he paid sums to his creditor generally; the debtor enters them on his book as paid on account of what was due by specialty. It was held, that the entries in the debtor's book did not constitute a sufficient application of them (*g*).

If a surety undertakes to be answerable for debts to be contracted by his principal not exceeding a certain amount, and the creditor give the principal credit beyond that amount, and the principal becoming embarrassed, assigns all his effects to trustees for the payment of his creditors *pro ratâ*, the payment by the trustees of a dividend upon the whole amount of the creditor's debt, is a specific appropriation of payment to each and every part of the demand, and the creditor is not justified in deducting the whole sum received as a dividend from the gross amount of the debt, and holding the surety liable on his undertaking for the remainder of the demand, up to the extent of the undertaking, but the dividend received by the creditor is to be applied rateably to the whole debt, as well the part covered by the undertaking as the part which is left uncovered, and, consequently, a rateable deduction is to be made for the sum covered by the guarantee (*h*). A. was indebted to C. by bond, in which B. was bound as his surety, and was also indebted to C. by simple contract, and A. and C. came to a stated account for all the monies owing to C., as well for what was due on the bond in which B. was bound as surety, as for what was due to C. upon simple contract, and A. makes C. a bill of sale towards satisfaction of the whole debt: the money raised by the bill of sale must be applied proportionally, as well in reducing the debt for which B. stood bound, as towards payment in proportion of

(*g*) Manning *v.* Westerne, 2 Vern. 606. S. C. Eq. Ca. Ab. 147, pl. 2.
(*h*) Bardwell *v.* Luddell, 7 Bing. 489. Payley *v.* Field, 12 Ves. 435. Ex parte Rushforth, 10 Ves. 409.

the debt due on simple contract, inasmuch as both debts had been included in one stated account, and the bill of sale made towards satisfaction of the whole debt (*i*).

But if the debtor, at the time of paying, makes no application, the creditor, to whom money is due for different causes, may make the application by the acquittance which he gives: "Quoties non dicimus in id quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat" (*j*).

This rule also is adopted in the several systems of jurisprudence before referred to (*k*).

It was, however, required by the Civil Law, and by the law of Holland, Spain, France, and Scotland, that the application should be made at the instant, "dummodo in re præsenti fiat in re agendâ, ut vel creditori liberum sit non accipere, vel debitori non dare, si alio nomine solutum quis eorum velit, postea non permittitur" (*l*).

It would seem, from decisions in England, that the creditor may at any time elect how the payments made to him shall retrospectively receive their application (*m*).

There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem on the contrary to imply a recognition of the principle of

(*i*) Perris *v.* Roberts, 1 Vern. 34. S. C. 2 Ch. Ca. 83.

(*j*) Dig. lib. 46, tit. 3, l. 1.

(*k*) Voet. lib. 46, tit. 3, n. 16, L. 14, tit. 10, Part 6. Code Civil, Art. 1255. Toullier, ib. n. 176. Erskine, b. 3, tit. 4, § 2. Campbell, May 20, 1828, 6 S. & D. 830. Manning *v.* Westerne, 2 Vern. 606. Blass *v.* Cutting, cited 2 Strange, 1194; Vin. Ab. tit. Payment. Clayton's case, 1 Mer. 605.

(*l*) Dig. ibid. 1, 2, 3. Voet, ibid. Partida, ibid. Pothier, ibid. Toullier, ibid. Erskine, ibid.

(*m*) Goddard *v.* Cox, 2 Stra. 1194. Wilkinson *v.* Sterne, 9 Mod. 427. Newmarch *v.* Clay, 14 East, 239. Peters *v.* Anderson, 5 Taunt. 596. Clayton's case, 1 Merr. 605. Simpson *v.* Ingham, 2 B. & Cress. 65. S. C. 2 Dowl. & Ry. 219. Philpott *v.* Jones, 2 Ad. & Ell. 41, and see the judgment in Mills *v.* Fowkes, 5 Bing. N. C. 455. Comm. For. & Col. Law, vol. 3, p. 828.

the civil law. The creditor, in each of these cases elected *ex poste facto* to apply the payment to the last debt. It was in each case held incompetent for him so to do.

It seems to be the doctrine of the Courts in America, except in Louisiana, that the creditor may at any time apply the payment to which account he pleases, if the debtor has not, at the time he made it, directed its appropriation (*n*).

In giving to the creditor the right of application, when it was not made by the debtor, the civil law required that it should be equitable. "In arbitrio est accipientis, cui potius debito acceptum ferat; dummodo in id constituat solutum, in quod ipse, si deberet, esset soluturus, id est, in id debitum quod non est in controversiâ, aut in illud, quod pro alio quis fidejusserat, aut cujus dies nondum venerat" (*o*).

It has been considered that this qualification of the rule is only to be admitted so long as the payment remains unappropriated by the creditor, and the debtor has not accepted from the creditor an acquittance importing a particular appropriation of the payment (*p*).

The Code Civil does not allow the debtor, after he has accepted a discharge by which the creditor has appropriated the payment to one of the debts specially, to demand its appropriation to a different debt, unless there has been fraud or surprise on the part of the creditor (*q*).

The doctrine adopted by the law of Scotland is, that the debtor shall not by such appropriation be left exposed to penal consequences, nor shall the payment be ascribed to a disputed

(*n*) The Mayor, &c. of Alexandria *v.* Patten, 4 Cranch, 317. Mann *v.* Marsh, 2 Caine, 99. Barrett *v.* Lewis, 2 Pick. 123. Jarvis *v.* Rogers, 15 Mass. Rep. 396. Bradford *v.* Kimberley, 3 Johns. Ch. Rep. 431. Hendrick *v.* Robinson, 2 Johns. Ch. Rep. 309.

(*o*) Dig. lib. 46, tit. 3, l. 1.

(*p*) Bachovius, vol. 2, Disp. 29, l. c. Voet, lib. 46, tit. 3, n. 16, Pothier, Tr. des Oblig. n. 565.

(*q*) Code Civil, Art. 1255. Toullier, liv. 3, tit. 3, c. 5, n. 176.

debt, nor a cautioner deprived of the benefit of the payment where the debtor is insolvent, nor a payment, as understood at the time, ascribed differently on emerging circumstances, nor a dividend from a sequestrated estate applied otherwise than to the whole debt (*r*).

When neither the debtor nor creditor applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debt, or the priority in which they were incurred. And as it was the expressed intention of the debtor that would in the first instance have governed, so it was his presumable intention that was first resorted to as the rule by which the application was to be determined (*s*). In the absence, therefore, of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor? Hence the payment was to be appropriated to a debt which was not contested, rather than to one which was; to a debt which was due at the time of payment rather than to one which was not: "Quod si forte à neutro dictum sit; in his quidem nominibus, quæ diem vel conditionem habuerunt, id videtur solutum cujus dies venit"(*t*).

Among several debts which are due, the application is to be made to the debt for which the debtor was liable to be imprisoned, rather than to debts merely civil, in respect of which process could only issue against his effects.

Although this rule is adopted by the law of Holland and Spain, and by the former law of France, yet the Code Civil does not seem to have retained it.

Among civil debts, the application should be made to that

(*r*) Erskine, b. 3, tit. 4, s. 2. M'Reith, Feb. 13, 1680, Dict. 6801.

(*s*) Duchess of Buccleugh, Feb. 1725. Dict. 6807. M'Nee, May 25, 1824; 3 S. & D. 60, and in House of Lords, Feb. 24, 1826; 2 Wilson & S. App. Cas. 7. Bannatyne's Representatives, Feb. 26, 1825; 3 S. & D. 593. Allan, March 1, 1831; 9 S. & D. 519.

(*t*) Dig. lib. 46, tit. 3, l. 3, § 1, l. 103.

which carries interest, rather than to that which does not, and to an hypothecatory debt rather than to another (*u*).

The payment is to be applied to the debt for which the debtor had given sureties, rather than to that which he owed singly. "Et magis, quod meo nomine, quam quod pro alio fidejussorio nomine debeo, et potius quod cum pœnâ, quam quod sine pœnâ debetur: et potius quod satisdato, quam quod sine satisdatione debeor."

The reason assigned by Pothier is, that in discharging it he exonerates himself from the liability of two creditors, that is, from his principal creditor, and from his surety, whom he is obliged to indemnify; and that he has more interest in being acquitted against two creditors than against a single creditor (*v*).

The application ought to be made to a debt, in respect of which the person was principal debtor, rather than to that for which he was debtor only as surety (*w*).

If the debts are of an equal nature, and such that the debtor had no interest in acquitting one rather than the other, the application is made to that of the longest standing: "Si nulla causa prægravet in antiquiorem."

If two debts were contracted the same day, but payable at different periods which have both expired, the debt which first became payable is understood to be the more ancient (*x*).

If the different debts are of the same date, and in other respects equal, the application should be made proportionately to each. "Si par et dierum et contractuum causa sit, ex omnibus summis pro portione solutum" (*y*).

In debts carrying interest, the application is made to the

(*u*) Voet, lib. 46, tit. 3, n. 16, l. 10, tit. 14, Part 6. Pothier, Tr. des Oblig. n. 567. Toullier, liv. 3, tit. 3, n. 179.

(*v*) Pothier, Tr. des Oblig n. 567.

(*w*) Dig. lib. 46, tit. 1, l. 97, l. 4.

(*x*) Ibid. l. 5.

(*y*) Dig. ib. l. 8.

interest before the principal: "Prius in usuras id, quod solvitur, deinde in sortem accepto feretur" (*z*).

Even when the acquittance expresses that the sum was paid on the account of the principal and interest: "In sortem et usuras," the sum is received on the account of the principal after the interest is satisfied: "Sed ego non dubito, quin hæc cautio *in sorte, et in usuras*, prius usuras admittat; tunc deinde, si quid superfuerit, in sortem cedat" (*a*).

If the sum paid exceeds what is due for interest, the residue is applied to the principal, even if the application had been expressly made to the interest, without mentioning the principal, if the principal be demanded (*b*).

But if the debtor of an annuity has paid more than he owes for the arrears, he would be entitled to recover the surplus. He could not insist upon having it applied to the principal of the annuity (*c*).

It has been held, that when the interest is due by a debtor, from the time of a judicial demand being made as a penalty for his delay, such interest is awarded by way of damages, and forms a debt distinct from the principal. A payment by the debtor is applied rather to the principal than to this interest (*d*).

If the creditor pays himself out of the proceeds of the sale of property hypothecated to him, the application ought to be made rather to the debt for which the property was hypothecated, than to others for which it was not, although it may be more for the debtor's interest to discharge the former than the latter. "Paulus respondit, *aliam causam esse debitoris solventis, aliam creditoris pignus distrahentis.* Nam cum de-

(*z*) Cod. lib. 8, tit. 43, l. 1.

(*a*) Dig. lib. 46, tit. 3, l. 5, s. 3.

(*b*) Dig. ib. l. 102, § 3.

(*c*) Pothier, Tr. des Oblig. n. 570. Toullier, liv. 3, tit. 3, n. 182.

(*d*) Pothier, ib. n. 571, Arrêt. July 8, 1649. Journal des Aud. tom. 1, Arrêt. July 15, 1706, ib.

bitor solvit pecuniam, in potestate ejus esse commemorare, in quam causam solveret; cum autem creditor pignus distraheret, licere ei pretium in acceptum referre, etiam in eam quantitatem, quæ naturâ tantum debebatur, et ideo deducto eo debitum peti posse" (*e*).

When the property is charged as a security for different debts, the application is made to that of which the right of hypothecation is strongest; for instance, to a privileged debt, rather than to a simple hypothecation. Among simple hypothecations, the application will be made to the debt of which the hypothecation was the most ancient. If the rights of hypothecation were equal, the application should be made to all rateably, *pro modo* debiti. "Cum eodem tempore pignora duobus contractibus obligantur, pretium eorum pro modo pecuniæ cujusque contractus creditor accepto facere debet; nec in arbitrio ejus electio erit, cum debitor pretium pignoris consortioni subjecerit; quod si temporibus discretis superfluum pignorum obligari placuit: prius debitum pretio pignorum jure solvetur, secundum superfluo compensatibur" (*f*).

The preceding rules, with the exception which has been noticed, have been adopted by the laws of Holland, Spain, and France (*ff*).

It has been stated, by Sir William Grant, that some of the cases decided in England have adopted a principle contrary to that on which these rules of the civil law are founded, and that when the debtor has made no appropriation, the creditor

(*e*) Dig. lib. 46, tit. 3, l. 101, § 1.

(*f*) Ibid. l. 96, § 3.

(*ff*) Voet, lib. 46, tit. 3, n. 16. Fab. Cod. lib. 8, tit. 29, def. 31. Carpz. Def. For., part 2, const. 29, def. 17. Resp. Jurisc. Holl., part 3, vol. 1, cons. 245. Menoch de Præs. lib. 3, præs. 136. H. Grotius. ad Jurisp. Holl. lib. 3, c. 39, n. 28. Casareg. Disc. 120, 140, 199, L. 10, tit. 14, Part 5. Pothier, Tr. des Oblig. n. 567, *et seq.* Code Civil, Art. 1254, *et seq.* Toullier, liv. 3, tit. 3, n. 177, *et seq.* Erskine, b. 3, tit. 4, § 2.

is left to make that application which is most for his interest (*g*); although the two other cases to which he refers, proceed on the recognition of those rules of the civil law (*h*).

The two latter cases must have been decided on the ground, either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way the rule would agree with the decision of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time; if one be more burthensome or penal than another, it is to that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule. The Lord Chief Justice of the Common Pleas explains the ground and reason of the case of *Dawe* v. *Holdsworth*, in precise conformity to the principle of the civil law.

Sir William Grant proceeds to observe, that the cases set up two conflicting rules; the presumed intention of the debtor, which, in some instances at least, is to govern, and the *ex post facto* election of the creditor, which in other instances is to prevail (*i*). And, without stating what is the rule where the debts are distinct insulated debts, between which a plain line of separation could be drawn, he lays down the rule where the case is that of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of

(*g*) Goddard *v.* Cox, 2 Str. 1194. Wilkinson *v.* Sterne, 9 Mod. 427. Newmarsh *v.* Clay, 14 East, 239. Peters *v.* Anderson, 5 Taunt. 596.

(*h*) Meggott *v.* Mills, 1 Lord Raym. 287. Dawe *v.* Holdsworth, Peake, N. P. 61; 2 Brownl. 107. Heyward *v.* Lomax, 1 Vern. 24; 8 Mod. 236; Comb. 463. Perry *v.* Roberts, 2 Ch. Ca. 84. Styart *v.* Rowland, 1 Show. 215.

(*i*) Clayton's case, 1 Mer. 605.

the 500*l.* paid in on Monday, and this other to the account of the 500*l.* paid in on Tuesday. There is a fund of 1000*l.* to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumeably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged, or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and, particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? (*j*).

Where there are distinct demands, one against a firm and the other against one only of the partners, if the money paid be the money of the partners, and be not specifically appropriated by the payer, the creditor must not, and the law will not apply it to the demand upon the individual, for that would be to pay the debt of one with the money of others (*k*).

And though, where prior demands are equitable, and subsequent ones legal, the creditor may apply a general payment to the former (*l*); yet if the prior demands be legal, and the subsequent equitable, the Courts will not allow a general payment to be appropriated at the time of trial to the latter (*m*). Nor will an appropriation be allowed which would deprive the

(*j*) Clayton's case, 1 Mer. 608.

(*k*) Thompson *v.* Brown, 1 M. & M. 40.

(*l*) Bosanquet *v.* Wray, 6 Taunt. 597; 2 Marsh. 519. Birch *v.* Tebbutt, 2 Stark. 74.

(*m*) Goddard *v.* Hodges, 2 Tyrwh. 213.

party paying of a benefit, such as the taxation of costs; and, therefore, an attorney cannot apply a general payment to the taxable items of his bill only (*n*). If some of the demands be illegal, a general payment will be applied to the legal demands (*o*).

Where the same broker sold goods of A. and goods of B. to the payer, a general payment, if insufficient to discharge both debts, must be applied proportionably to them both (*p*).

An intention on the part of the debtor to appropriate to a particular debt is, perhaps, more easily presumed in favour of a surety, where there are any circumstances which can be considered indicative thereof (*q*); but, in the absence of such circumstances, the law, it seems, will not apply a payment in his favour (*r*).

Where A. engages to be answerable for all advances made to B. by C. until the happening of a particular event, and the event happens which puts an end to the surety's engagement, at which time there is due to C., on balance of accounts between him and B., a certain sum of money (*s*); or if B. being indebted to C., A., as B.'s surety, joins him in a bond to C., conditioned for the payment of a certain sum of money and interest, at a time specified, or upon demand (*t*), and C. sub-

(*n*) James *v.* Child, 2 Tyrwh. 735.

(*o*) Ribbans *v.* Crickett, 1 B. & P. 264. Wright *v.* Laing, 3 B. & C. 166. Cruikshanks *v.* Rose, 1 M. & Rob. 100. Phillpott *v.* Jones, 4 Nev. & Man. 14.

(*p*) Favenc *v.* Bennett, 11 East, 36.

(*q*) Maryatts *v.* White, 2 Stark. 101. Shaw *v.* Picton, 4 B. & C. 715.

(*r*) Nottige *v.* Prichard, 8 Bligh. 498. Plomer *v.* Long, 1 Stark. 153. Kirby *v.* Duke of Marlborough, 2 M. & S. 18. Brewer *v.* Knapp, 1 Pick. 336. Dedham Bank *v.* Chickering, 4 Pick. 314. Boston Hat Manufactory *v.* Messenger, 2 Pick. 223. Baker *v.* Stackpoole, 9 Cowen, 420. Hilton *v.* Burley, 2 N. Hamp. Rep. 196. Briggs *v.* Williams, 2 Vermont Rep. 286. United States *v.* January, 7 Cranch, 572.

(*s*) Clayton's case, 1 Mer. 572.

(*t*) Walker *v.* Hardman, 11 Bli. N. S. 229.

sequently continues to carry on his dealings with B. in the same manner as he used to do, and as if nothing had happened, and makes no rest or distinction in the accounts, and receives from B. in the course of such dealings any payments, those payments, if unappropriated by the debtor or creditor, are, in the first instance, to be applied in reduction of the balance due to C. for which the surety was liable, although it may have happened that C. had advanced to B. sums to a greater amount than those he subsequently received from him (*u*).

A creditor by judgment, and also by bond, receives two hundred pounds in part of the purchase of the estate of the debtor, but gives no notice that he would apply it to the bond debt: the law applies it towards satisfaction of the judgment (*v*).

The right of the debtor or creditor to make the appropriation exists only when the payment is voluntary. It is only from the presumed assent of the debtor that the creditor makes the appropriation, and neither the debtor nor creditor can direct the application of the proceeds of a levy (*w*).

Amongst the various important questions which arose in the case of *Campbell* v. *Beckford*, on appeal before the Privy Council from the decree of the Court of Chancery in Jamaica, the manner in which the appropriation of the proceeds of the mortgaged premises should be made by Beckford, the mortgagee, became the subject of discussion. Mr. Beckford was the assignee of several mortgages. He obtained and held the possession of the mortgaged premises for a great length of

(*u*) Clayton's case, 1 Mer. 572. Bodenham *v.* Purchas, 2 B. & Ald. 39. Brooke *v.* Enderby, 2 Brod. & B. 70. Strange *v.* Lee, 3 East, 484. Bellairs *v.* Ebsworth, 3 Camp. 53. Simpson *v.* Cooke, 1 Bing. 452. Pemberton *v.* Oakes, 4 Russ. 154; see the judgment of Lord Kenyon, in Dawe *v.* Holdsworth, Pea. 64; and Williams *v.* Rawlinson, 3 Bing. 71. S. C. 1 Ry. & M. 233. S. C. 10 J. B. Moo. 362. Ex parte Randleson, 2 Deac. & Ch. 534.

(*v*) Brett *v.* March, 1 Vern. 468.

(*w*) Blackstone Bank *v.* Hill, 10 Pick. 132.

time, and considered himself the owner. Some of the persons entitled to the equity of redemption sold it for a trifling sum to a Mr. Campbell, who filed his bill to redeem. Beckford set up his length of possession as a bar to the suit for redemption. It was, however, decided, that the right of redemption was not barred, and that Beckford, and those claiming under him, must be considered mortgagees in possession, and a decree was made directing accounts to be taken of their receipts, &c., as mortgagees in possession. One of the mortgages held by Beckford had been granted at the time when 10*l.* per cent. was the lawful rate of interest in Jamaica. The Master in Jamaica appropriated the proceeds of the mortgaged premises received by Beckford, first in discharge of the mortgages which carried interest at the rate of 10*l.* per cent. This appropriation was not varied by the Privy Council, although, in other respects, the Master's report was referred back for review on the exceptions which had been taken (*x*).

SECTION III.

CONSIGNATION—TENDER.

Tender as distinguished from consignation.—Consignation defined.—Its effect.—What sufficient.—How made.—By and to whom.—Effect of withdrawing the sum consigned.—Law of the different States of Europe.—Scotland.—Tender in England.—The obligation of the surety is extinguished by consignation or tender.

An actual tender of the debt made at a proper time and place to the person competent or authorized to receive it, even although there be no consignation or deposit of it, had the

(*x*) Campbell *v.* Beckford, P. C. June, 1819.

effect, according to the civil law, of discharging the debtor from all liability, if the subject-matter of the tender afterwards perished without his fault (*y*). It seems also that interest ceased from the time such tender was made (*z*).

But if, in addition to the tender, the consignation and deposit of the thing were made at the proper time and place, it is considered the debtor has the full benefit of having made an actual payment, and the thing consigned is at the risk of the creditor, and not of the debtor (*a*).

But the tender alone, unless it was accompanied by the consignation, did not, by the law of Holland, stop the running of interest (*b*).

By the former law of France, if an actual offer of the debt were made, and followed by consignation, the debtor was exonerated from all risk, and the interest ceased from the time of the tender (*c*). Such also is the doctrine of the Code Civil (*d*).

By consignation, is meant a deposit by a debtor of the thing which he owes into the hands of a third person, and under the authority of a Court of justice (*e*).

(*y*) Dig. lib. 46, tit. 3, l. 39.

(*z*) Cod. lib. 4, tit. 32, l. 6. Dig. lib. 45, tit. 1, l. 122, § 5; lib. 50, tit. 17, l. 39. Molin, Tr. de Usur. Q. 39, n. 296. Pothier, Tr. de Cont. de Rente, n. 209. Voet, lib. 22, tit. 1, n. 17. Noodt. de Fœn. et Usur. lib. 3, c. 15.

(*a*) Math. de Auct. lib. 1, c. 13, n. 19. Voet, lib. 46, tit. 3, n. 29.

(*b*) Voet, ib. n. 28, and lib. 22, tit. 1, n. 17. Sande. Decis. Fris. lib. 3, tit. 14, def. 13. Cod. lib. 4, tit. 32, l. 9. Fab. Cod. lib. 8, tit. 29, def. 5, *et seq.*, and lib. 4, tit. 3, def. 15. Groenweg. ad Cod. lib. 4, tit. 32, l. 6. Menoch de Arbitrar Jud. lib. 2, Cas. 232, n. 2.

(*c*) Pothier, ib. n. 209. Molin de Usur. ib. Toull. liv. 3, tit. 3, c. 5, n. 224.

(*d*) Code Civil, Art. 1257, 1259. Code de Proced., Art. 816. Toull. ib. n. 226.

(*e*) Cod. lib. 4, tit. 32, l. 6, 19; lib. 8, tit. 43, l. 9. Dig. lib. 16, tit. 3, l. 1, § 36; lib. 18, tit. 3, l. 8; lib. 22, tit. 1, l. 41, § 1. Fab. Cod. lib. 8, tit. 29, def. 6, 7. Zang. Except. part 3, c. 2, n. 79, 83. Van Lecuwen Cens. For. lib. 4, c. 35, n. 2, 3, 7, L. 8, tit. 14, Part 5.

The consignation made upon the refusal of the creditor, is equivalent to a payment, and extinguishes the debt no less than if an actual payment had been made; "Obsignatione totius debitæ pecuniæ solemniter factâ liberationem contingere, manifestum est" (*f*).

There must be an effectual offer of payment in order that the creditor may be put "*in morâ*," and the consignation rendered equivalent to a payment (*g*).

It must be made to the creditor himself, or to a person qualified to receive on his behalf, or to the person indicated by the contract, and it must be made by a person who has a legal capacity to pay (*gg*).

The sum tendered must be the entire amount which is due, unless the debt is payable by instalments. The debt must be payable, and the tender must be made at the place appointed for the payment: "Ita demum oblatio debiti liberationem parit, si eo loco quo debetur, solutio fuerit celebrata" (*h*).

The tender is made by the public officer who has the execution of process, or by notaries, a notice having been previously given to the creditor for him to receive it. A minute, or procès verbal, is prepared, stating the tender, the amount, &c. tendered, and the refusal of the creditor, and of the summons which is given him to appear before the judge, in order that the tender may be declared valid, or for the purpose of directing a consignation. The summons is to appear immediately before the judge, who thereupon directs a consignation, assigning the creditor to be present at such consignation, at a time and place particularly specified (*i*).

(*f*) Ibid. Cod. lib. 8, tit. 43, l. 9.
(*g*) Ibid. (*gg*) Ibid.
(*h*) Ibid.
(*i*) Pothier, Tr. des Oblig. n. 578. Ferriere, Coutume de Paris, Art. 136, gl. 1. n. 7. Du Parc. Poullain Princip. du Droit, tom. 6, p. 116, n. 156.

The Code Civil has adopted a similar form of proceeding (*j*).

But the previous order of the judge is not absolutely necessary; the summons may merely specify that the consignation will be made at a particular time and place. If it be made accordingly and duly notified, it is valid; and the subsequent judgment and confirmation have a retrospective effect to the time of the consignation.

The debtor, if the consignation be adjudged to be valid, becomes thereby absolutely discharged, and, as already observed, the thing consigned is no longer at his risk, but at that of the creditor (*jj*).

It has been a question, whether, if the consignation be withdrawn, the sureties will still remain liable. If it is withdrawn before it is ordered or confirmed by the judge, the consignation will be deemed not to have been made, and the sureties, therefore, would not be discharged; for the act of consignation not being in itself equivalent to a payment, it is the sentence of the judge which gives it that effect, and extinguishes the debt (*k*).

But if the money consigned is not withdrawn until after sentence, it ought not, in the opinion of Pothier, to prejudice the sureties or joint-debtors, who have been already liberated (*kk*).

The consignation of money is made by the law of Scotland on the redemption of a wadset, or pledge, the refusal of the creditor to take his money; and where there is a sum *in medio* in a competition by multiple poinding; or a demand for money is suspended. The risk is with him who is in fault, or who consigns only a part, or in improper hands selected by himself. The consignatory must keep the sum consigned in safety, till

(*j*) Toullier, liv. 3, tit. 3, n. 201, *et seq.*

(*jj*) Ibid.

(*k*) Pothier, ib. n. 580. Voet, lib. 46, tit. 3, n. 29. Brunneman, ad Cod. lib. 4, tit. 32. Zoes. ad Pand. lib. 46, tit. 3, n. 37.

(*kk*) Pothier, Ibid.

called for, and is not entitled to part with it. Consignations are now usually made in banks, and bank interest is due (*l*).

In the absence of directions from the creditor, a legal tender of the debt is, according to the law of England, constituted only by the actual production and offer of the sum due, unless the creditor dispense with it by a declaration that he will not accept it (*m*).

It must be of *money*, if beyond forty shillings in gold, or in what has been rendered by Act of Parliament equivalent to money, for that purpose; viz., notes of the Bank of England, payable to bearer on demand, which are a legal tender for any sum *above five pounds*, except at the Bank itself, and its branches (*n*). But although, strictly speaking, a legal tender must be in money, if required, yet a tender of country bank notes, if not objected to on that account, will be sufficient (*o*).

The tender of a larger sum than that which is due, is legal (*p*); but a tender of a larger sum, requiring change, is not so (*q*). A tender must not be accompanied by a condition (*r*), as that a document shall be given up to be cancelled, or a receipt in full given (*s*).

If, however, the creditor refuse to receive the money on some

(*l*) Stair, b. 1, tit. 13, § 6. Ersk. b. 3, tit. 1, § 31. Scott, July 28, 1665. Dict. 10, 118. Mouwat. Feb. 15, 1673. Ibid.

(*m*) Thomas *v.* Evans, 10 East, 101. Dickinson *v.* Shee, 4 Esp. 68. Glascott *v.* Day, 5 Esp. 48. Holland *v.* Phillips, 6 Esp. 46.

(*n*) Stat. 3 & 4 Wm. 4, c. 6, § 98.

(*o*) Polglase *v.* Oliver, 2 Tyrwh. 92.

(*p*) Dean *v.* James, 4 Bar. & Adol. 546. Wade's case, 5 Rep. 114. Noy. 74.

(*q*) Robinson *v.* Cook, 6 Taunt. 336. Watkins *v.* Robb, 2 Esp. 711. Batterbee *v.* Davis, 3 Camp. 70.

(*r*) Mitchell *v.* King, 6 Car. & P. 237. Evans *v.* Judkins, 4 Camp. 156. Free *v.* Kingston, ibid. Huxham *v.* Smith, 2 ib. 21. Glasscott *v.* Day, 5 Esp. 48. Cole *v.* Blake, Peake, 178.

(*s*) Simmons *v.* Wilmot, 3 Esp. 91.

other account, *e. g.*, on the ground that more is due to him, and do not object to the informality of the tender, that will in general cure such informality (*t*) if an offer has actually been made (*u*).

A tender to an authorized agent is a tender to his principal (*v*). And a tender to one of several joint creditors is a tender to all (*w*).

The consequence of a refusal by the creditor to receive payment when tendered, is that the tender, accompanied by a payment of the sum tendered into Court, will be a good defence to an action which he may bring, unless he can prove a prior or subsequent demand and refusal (*x*). The tender prevents interests from afterwards running against the debtor (*y*).

At the common law and before the recent act 3 & 4 Wm. 4, c. 42, s. 21, the practice of paying money into Court by a defendant, was confined to actions upon contracts for the recovery of a debt which was either certain in amount, or capable of being ascertained by ordinary computation and without the exercise of any discretion or judgment by a jury (*z*).

But an action for what are termed general or uncertain damages whether claimed for the breach of a contract (*a*), or

(*t*) Wright *v.* Read, 3 T. R. 554; 2 Bos. & Pul. 526. Lockyer *v.* Jones, Peake, 180. Black *v.* Smith, ib. 33. Cole *v.* Blake, ib. 178. Huxham *v.* Smith, 2 Camp. 21. Glascott *v.* Day, Esp. 48. Read *v.* Goldring, 2 M. & S. 86.

(*u*) Thomas *v.* Evans, 10 East, 101. Dickinson *v.* Shee, 4 Esp. 68. Douglas *v.* Patrick, 3 T. R. 684.

(*v*) Goodland *v.* Blewith, 1 Camp. 477.

(*w*) Douglas *v.* Patrick, 3 T. R. 684.

(*x*) Spybeg *v.* Hide, 1 Camp. 181. Rivers *v.* Griffiths, 5 B. & Ald. 630. Cooke *v.* Callaway, 1 Esp. 115.

(*y*) Dint *v.* Dum, 3 Camp. 290. Hume *v.* Peploe, 8 East, 168; 1 Lord Raymond, 154.

(*z*) Tidd. 9 Ed. 619. Hallett *v.* East India Company, 2 Burr. 1120.

(*a*) Hodges *v.* Lord Litchfield, 3 M. & Scott. 201 S. C. Dowl. 741.

for a breach of duty by a sheriff under an execution (*b*), or for a tort, or in trover, or trespass (*c*), money was not allowed to be brought into Court.

The 3 & 4 Wm. 4, c. 42, s. 21, enables the defendant in all personal actions (except actions for assault or battery, false imprisonment, libel, slander, malicious arrest, or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant) by leave of any of the superior Courts, where such action is pending, or a judge of any of those Courts, to pay into Court a sum of money, by way of compensation or amends in such manner and under such regulations as to the payment of costs, and the form of pleading, as the judges may, by any rules or orders by them to be from time to time made, order and direct.

The obligation of the surety is extinguished by a valid consignation or tender made by him or the principal to the creditor (*d*).

Smith *v.* King, ib. 799; 2 Dowl. 750; 3 Chitty's Pract. 648.

(*b*) Woodgate *v.* Baldock, 2 Dowl. 256. Groombridge *v.* Feitcher, ib. 353.

(*c*) Gibson *v.* Humphry, ib. 68; 3 Chitty's Pract. 684.

(*d*) Hering. de Fidejuss. c. 20, s. 1, n. 34, 35.

CHAPTER III.

TRANSACTIO.—COMPROMISE.

Definition of.—Subjects of.—In what manner it may be made.—Effect of.—Strict construction of.—Cannot be invalidated by proofs derived ex instrumentis noviter repertis.—May be invalidated if the instruments on which the party acted were false, or if there had been fraud or mistake.—Rules of the Code Civil.—Law of England.—The parties to the transaction alone affected by it.—Law of England.—Whether the creditor transacting with the debtor can reserve his remedies against the surety.—Doctrine of the Civil Law.—The law of England.

THE contract or obligation of suretyship is also extinguished by a compromise, *per transactionem*, made between the creditor and principal, "non possunt conveniri fidejussores liberato reo transactione" (*a*), or between the creditor or surety.

By transaction or compromise is understood that agreement by which a doubtful question or a suit, uncertain as to its issue, are so terminated and settled, that the party receives something in consideration of such transaction (*b*).

"Cæterum passim in usu juris et præsertim in argumento proposito specialiter hoc verbum usurpatur, et pro ea duntaxet conventione accipitur, qua rem dubiam litemque incertam ita finimus atque expedimus, ut pro eo aliquid vicissim accipiamus: neque aliud in proposito est transigere, quam

(*a*) Dig. lib. 46, tit. 1, l. 68, § 2. Dig. lib. 2, tit. 15, l. 7. Poth. ad Pand. lib. 2, tit. 15, n. 4.

(*b*) Dig. lib. 2, tit. 14, l. 1. Cod. lib. 2, tit. 4, l. 38.

rem dubiam litemve incertam consensu terminare, dato aliquo seu promisso, aut retento (*c*).

"Transactio igitur, ut tribus verbis dicam, est non gratuita rei dubiæ decisio facta conventione partium" (*d*).

The matter is said to be doubtful and uncertain as to its issue, not only when a suit has been instituted and is pending respecting it, or when a suit can or may be instituted respecting it, or when a suit is apprehended, but even when the matter is for any other cause doubtful. "Illud notandum est, in causa transactionis rem dubiam dici non solum eam, de qua lis jam mota est; sed etiam eam, de qua moveri potest, aut lis metuitur (*e*), imo amplius et si neque lis sit, neque lis metuatur, dummodo alia ratione res sit dubia (*f*).

"Cum te proponas cum sorore tua de hereditate transegisse, et ideo *certam pecuniam et te debere* cavisse: etsi nulla fuisset quæstio hereditatis, tamen propter timorem litis transactione interposita, pecunia recte cauta intelligitur: ex qua causa si fisco solvisses, repetere non posses: et si non solvisses, tamen jure convenireris (*f*).

"Neque metuatur, si tamen alia ratione res dubia et incerta sit, transactio valet; velut si spes fideicommissi propter incertam conditionem modico præsenti accepto remittatur" (*g*).

But when the matter is not the subject of a suit already instituted and pending, or of a suit apprehended, nor of any doubt, a compromise is a nullity.

"Da re autem certa sive de negotio, quo nullum dubium

(*c*) Vinnius de Transact. l. 1, 2, p. 183, l. 38. Dig. lib. tit. 14, l. 38.

(*d*) Vinnius, ib. p. 183.

(*e*) Ibid. Cod. lib. 2, tit. 4, l. 2.

(*f*) Cod. lib. 2, tit. 4, l. 38, l. 11. Ibid. lib. 2, tit. 3, l. 1. Ibid. lib. 2, tit. 4, l. 8, § 23. Vinnius de Transact. cap. 4, l. 1, p. 184-5.

(*g*) Vinnius, ibid. Cod. lib. 2, tit. 4, l. 11.

est, nec lis, nec metus litis, transactio interposita nullius momenti est" (*h*).

If the matter has passed *in rem judicatam*, it is no longer the subject of compromise, because it is no longer doubtful or uncertain. "Quoniam igitur nulla transactio est nisi rei litigiosæ aut dubiæ, in consequens est de re judicata transigi non posse; ut pote quæ finem controversiæ inter partes facit litemque dirimit" (*i*).

But as by the Aquilian stipulation and the consequent acceptilation the right acquired by the judgment, might be destroyed, a transaction on that which had become res judicata was valid. By the law of Holland a compromise even on that which had ceased to be doubtful, since it had been rendered certain by the judgment was valid (*j*). A surety, therefore, against whom a judgment had been given, might by transaction not only obtain his own discharge, but that of the principal, as between the latter and the creditor. The Code Civil, by the article 2056, treats the transaction on that which has been established by judgment as null only when the parties, or one of them, are ignorant of such judgment (*k*). "La transaction sur un procès terminé par un jugement passé en force de chose jugée, dont les parties ou l'une d'elles n'avaient point connaissance, est nulle." The Court of Cassation accordingly decided that where the parties compromising had full notice of the judgment, the compromise was valid (*l*).

This article of the Code Civil forms part of the jurisprudence of the different states of Europe.

The compromise might under the civil law, and the former law of Holland and Spain, and the other States of Europe,

(*h*) Vinnius de Transact. p. 193.
(*i*) Ibid.
(*j*) Voet, lib. 2, tit. 15, n. 11.
(*k*) Code Civil, Art. 2056.
(*l*) Lamotte's case, Merlin Rep. tit. Transaction, ff. 2, p. 361.

except France, Holland, and Belgium, be by "parol;" but in the three last-named kingdoms it must be by writing. "Ce contrât doit être redigé par écrit" (*m*). The compromise would be effectual by the law of England if it were by "parol."

All those who are capable of contracting may compromise. Hence, tutors, syndics, &c. may contract for their wards and companies on a doubtful matter. If such compromise would involve the alienation of the ward's property, the authority of the Court would be required for that purpose (*n*).

A procurator or attorney has no power to compromise, unless he has a special authority for that purpose, or he is constituted *in rem suam*, or he has a general power *cum libera administratione* (*n*).

"Pour transiger, il faut avoir la capacité de disposer des objets compris dans la transaction" (*o*).

"Le tuteur ne peut transiger pour le mineur ou l'interdit que conformément à l'art (*p*), et il ne peut transiger avec le mineur devenu majeur, sur le compte de tutelle, que conformément à l'art" (*q*).

"Les communes et établissement publics ne peuvent transiger qu'avec l'autorisation expresse du Roi" (*r*).

The act of one partner is binding on his co-partners in all cases where the act done is incident to the relation of partners (*s*); and though, as a general rule, one partner cannot

(*m*) Art. 2056.

(*n*) Voet, lib. 2, tit. 15, n. 2. Vinnius de Transac. c. 3, n. 7, 8, 9. Resp. Jurisc. Holl., part 2, Consil, 201. Mont de Tutelis, c. 53, n. 239, *et seq.* Gomez. Var. Resol. 2, l. 14, n. 15. Hugo Grot. Manud. Jurisp. Holl. lib. 3, c. 4, n. 7.

(*o*) Code de Proced. 249, 1004.

(*p*) Code, Art. 467.

(*q*) 472, Code Civil, 499-513.

(*r*) Code Civil, Art. 542, 2045.

(*s*) Per Lord Eldon, C., in Ex parte Hall, 1 Rosc. 2; and see Ex parte Hodgkinson, 19 Ves. 391.

bind the others by deed, unless expressly authorized by the articles of partnership (*t*), yet it would seem that a compromise with the principal, is an act which one partner may do in behalf of his co-partners (*u*); and that it would conclude the firm, and discharge the surety both at law and in equity (*v*).

The transaction or compromise puts an end to the suit if it be proceeding, and bars any suit which may thereafter be instituted. It has the effect of *Res judicata*. "Non minorem auctoritatem transactionum, quam rerum judicatarum esse, recta ratione placuit: siquidem *nihil ita fidei* congruit humanæ, quam ea quæ placuerant, custodiri" (*w*).

Such also is the effect given to it by the Code Civil. "Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort" (*x*).

According to the law of Scotland, transaction is considered any agreement between two parties tending to the settlement of doubtful and controverted claims. It does not apply, in strictness, to mere contingencies. The sentence of a Court, if subject to review, does not exclude it. It may be entered into by any one who can lawfully administer his own affairs, or those of others. It has been observed, that of all agreements, the transaction or arrangement of doubtful rights is the most difficult to set aside (*y*). Transaction, with regard to moveables, cannot be proved by witnesses; but acquiescence in an alleged transaction may be inferred from the subsequent conduct of the party, and the facts and circumstances establishing it may be proved by witnesses (*z*).

(*t*) Harrison *v.* Jackson, 7 T. R. 207.
(*u*) See Hawkshaw *v.* Parkins, 2 Swanst. 539.
(*v*) Ibid.
(*w*) Cod. lib. 2, tit. 4, l. 20.
(*x*) Art. 888, 1351.
(*y*) Campbell Stewart, Nov. 22, 1826, 15 D. B. M. 112.
(*z*) Stair, b. 1, tit. 17, § 2. Bank, b. 1, tit. 23, § 1. Kaime's Equity,

By the law of England, a compromise, composition or agreement between the creditor and principal, founded on a good and valid consideration which discharges the principal, will also discharge the surety (*a*).

But if the surety has, previously to the agreement by which the principal obtains this discharge, paid part of the debt, and given a security for the remainder, and thus made it his own individual debt, the creditor, notwithstanding the compromise, will, in the absence of evidence of an intention to the contrary, retain his right against the surety for the remainder of the debt (*b*).

In the civil law, and in the codes founded on it in the other states of Europe, the transaction was considered to have so fully the effect of "*Res judicata,*" that it could not be invalidated upon instruments recently discovered, *noviter reperta,* since payment on that ground could not be invalidated. "Sub prætextu instrumenti post reperti transactionem bonâ fide finitam rescindi, jura non patiuntur" (*c*).

"Quid si nova instrumenta postea reperta sunt, quibus adversarius ostendere possit se non fuisse, obligatum, ejusque rei judici fidem facere. Ne hoc quidem prætextu transactionem bonâ fide factam magis quam rem judicatam rescindi jura nostra patiuntur quanquam initam ex falsis instrumentis retractari jubet (*d*); sed hoc etiam obtinet in re judicata."

181, 365. Tait on Evidence, 303. Tait's Justice, h. t. Blair's Justice, h. t. Brown's Synop. h. t. and p. 1446. Shaw's Digest. h. t., S. & D. XV. 749. Bell's Dictionary of the Law of Scotland, p. 998.

(*a*) Ex parte Wilson, 11 Ves. 420. Ex parte Smith, 3 Bro. C. C. 1. Ex parte Glendenning Buck. 517. Ex parte Carstairs, Buck. 560. English *v.* Darley, 2 Bos. & P. 61. Lewis *v.* Jones, 4 B. & C. 506. Thompson *v.* Harrison, 1 Cox, 344.

(*b*) See Hall *v.* Hutchins, 3 Myl. & K. 426.

(*c*) Cod. lib. 2, tit. 4, l. 19. Ibid. lib. 2, tit. 4, l. 29, l. 19. Hugo Grot. Manud. Jurisp. Holl. lib. 3, 4. Voet, lib. 2, tit. 4, n. 23.

(*d*) Vinn. de Trans. c. 8.

Neither is the transaction invalidated on the ground that it can be proved there was no cause for transaction, inasmuch as there was no demand in respect of which the transaction took place.

"In tantam autem transactione lis finitur, ut etiamsi transactio facta sit de causa, ex qua is, qui transegit, non erat obligatus, tamen non audiatur, allegans causam transigendi nullam fuisse. Sera quippe illa post transactionem allegatio est. Quin imo qui transactionis nomine promisit aut solvit, non recte dici potest sine causa promisisse aut solvisse, quia hoc ipsum ut à lite discedatur satis justa causa videtur atque huc etiam pertinet (*e*).

"Adhæc et eam transactionem retractari posse placet, quæ ex falsis instrumentis interposita est, id est, cui falsa instrumenta causam dederunt, cum quis videlicet falsis instrumentis ab adversario prolatis, horum metu inductus transegit, quippe cum eadem ex causa etiam res judicata rescindatur, ut modo diximus (*f*)."

But if the transaction had been induced by fraud, or if there had been fraud in the course of it, or if false instruments had afforded the cause for the transaction, if there had been a suppression of instruments, or if there had been an error in the calculation, the transaction would on either of these grounds be rescinded. "Si tamen dolum adversarii in transigendo intervenisse, quaqua ratione, sive novis instrumentis, sive alio probandi modo doceatur, vel instrumentorum suppressio per adversarium facta sit, vel manifesta calumnia, vel justus metus, vel ex falsis instrumentis transactio celebrata appareat; vel intervenerit error caculi, rescissione transactionis averti læsionem ab eo, qui circumventus est æquitas postulat, nisi super ipso calculi errore transactum sit" (*g*).

(*e*) Vinn. de Trans. c. 8.
(*f*) Ibid.
(*g*) Voet, lib. 2, tit. 15, n. 23.

The Code Civil adopts the same principles. "Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort" (*h*).

"Néanmoins une transaction peut être rescindée, lorsqu'il y a erreur dans la personne ou sur l'objet de la contestation" (*i*).

"Il y a également lieu à l'action en recision contre une transaction lorsqu'elle a été faite en execution d'un titre nul, à moins que les parties n'aient expressément traité sur la nullité" (*j*).

"Lorsque les parties ont transigé généralment sur toutes les affaires qu'elles pouvaient avoir ensemble, les titres qui leur étaient alors inconnus, et qui auraient été posterieusement découverts, ne sont point une cause de recision, à moins qu'ils n'aient été retenus par le fait de l'une des parties."

"Mais la transaction serait nulle, si elle n'avait qu'un objet sur lequel il serait constaté, par des titres nouvellement découvertes, que l'une des parties n'avait aucun droit (*k*).

"L'erreur de calcul dans une transaction doit être réparée" (*l*).

It is no sufficient answer to the surety's claim to be discharged that by accepting the composition from the principal every thing substantially has been done for the benefit of the surety (*m*).

Neither is it any answer that the composition originated in a mistake (*n*). Thus, the holder of a bill of exchange under the belief that the acceptor, who was residing at Hamburgh, had become bankrupt, and that a dividend had been set apart in respect of his bill, had directed his agent to receive the dividend under his supposed bankruptcy. It proved to be a composition

(*h*) Code Civil, Art. 2052.
(*i*) Art. 2053, 1110.
(*j*) Art. 2054, 1110, 1131, 1138.
(*k*) Art. 2057, Proced. 448-480, 10, 488.
(*l*) Art. 2058, Proced. 451.
(*m*) Ex parte Smith, 3 Bro. C. C. 1. Lewis *v.* Jones, 4 B. & C. 506.
(*n*) Ex parte Wilson, 11 Ves. 420, and see Lord Eldon's judgment in Ex parte Carstairs, Buck. 560, and Lewis *v.* Jones, 4 B, & C. 506.

instead of proceedings in the nature of a commission of bankruptcy, and the agent on the part of his constituent signed a deed of composition; it was held sufficient to exclude the holder from going against the other parties to the bill; and that the consequences of not knowing what the nature of the act was, must fall upon the holder of the bill (*o*).

The holder of a promissory note signed an agreement to accept from the maker *5s.* in the pound in full of his demand on having a collateral security for that sum from a third person, which was accordingly given to him. Representations were also made to him by the agent of the maker of the note, that notwithstanding the signing of the agreement for composition by the holder, an indorsee, who had indorsed the note for the accommodation of the maker, would continue liable for the residue of the debt secured by the note. But it was held, that the execution of the agreement had the effect of discharging the surety, and that the representations made to the holder respecting the legal effect of the instrument which he had signed were immaterial and did not avoid the composition, for every man is presumed to know the law. (*p*)

Such being the effect of the compromise, it must receive a strict construction, and is confined to the subjects which are expressed, or necessarily inferred from the terms of the compromise.

"Transactio, quæcunque sit, de his tantum, de quibus inter *convenientes* placuit, interposita creditur. Qui per fallaciam coheredis ignorans universa, quæ in vero erant, instrumentum transactionis sine Aquiliana stipulatione interposuit, non tam pasciscitur, quam decipitur" (*q*).

"Age cum Geminiano, quod pater ejus curator tibi datus negotia tua gesserit: et si apud judicem negabit se hac actione

(*o*) Ex parte Wilson, 11 Ves. 420.
(*p*) Ibid. 11 Ves. 420.
(*q*) Dig. lib. 2, tit. 15, l. 9.

teneri, quoniam transactio et Aquiliana stipulatio interposita est; judex contemplatione judicii quod bonæ fidei est, quæret, de quanta pecunia nominatim transactum sit: et si apparuerit de minore transactum, quantam pecuniam reliquam ex administratione curæ deberi probatum fuerit, solvere eum jubebit, quod non in stipulationem Aquilianam obligationis jure tantum deductum est, quanta erat quantitas pecuniæ quæ debebatur."

"Et si de hereditate, inter fratres aliosve transactio interposita sit, quasi omnibus hæriditariis rebus inter eos divisis, ac postea quædam per unum subducta appareant, actio de subductis superesse creditur, cum de subductis ne cogitatum quidem fuerit, et de non cogitatis non possit videri transactum. Multoque minus ad negotia futura, de quibus haud cogitatum, sese transactionis efficacia potest extendere" (*r*).

From the right of the surety to resist any action of the creditor against him, by insisting on the privilege *cedendarum actionum*, it would not be competent for the creditor in transacting with the debtor to reserve his rights against the surety. The transaction has extinguished the obligation of the debtor, and it would not be in the power of the creditor to cede to the surety his action against the debtor, because no action could be maintained by the creditor against the latter. The transaction, therefore, with the debtor extinguishes the obligation of his surety (*s*).

By the law of England the creditor may, when he enters into a composition with the principal, stipulate for the reservation of his remedies against other persons, and those persons will remain liable, though the effect of such reservation may be to defeat the object of the composition itself. Thus, where

(*r*) Cod. lib. 2, tit. 4, l. 3. Voet, lib. 2, tit. 15, n. 21. Grotius Manud. ad Jurisp. Holl. lib. 3, cap. 4, n. 13. Respons. Jurisc. Holl. part 1, consil, 229, and part 3, vol. 1, consil, 31. Sande Decis. Frisc. lib. 4, tit. 5, def. 15. Brunneman. ad Dig. lib. 2, tit. 15, l. 9.

(*s*) Hering. de Fidejuss. c. 27, p. 3.

the creditor has in his hands bills of exchange, accepted by a third party for the accommodation of the principal, sufficient to cover the creditor's debts over and above the composition money: the creditor, by reserving to himself the power of enforcing the security in his hands, may proceed against such accommodation acceptor, who, when he has paid the bills, may go against the principal to recover the money so paid by him, and thus the principal may have eventually to pay 20*s.* in the pound, and derive no benefit from the composition deed. Such a reservation must, however, clearly and distinctly appear upon the face of the instrument. If the instrument of composition be silent as to the securities in the hands of the creditor, and the instrument operate as an extinguishment of the original debt, it puts an end to the agreement between the principal and surety, and, consequently, the right of the creditor to proceed against the surety in all cases where the relation of principal and surety appears upon the security is extinguished both at law and in equity (*t*).

Transaction neither avails nor prejudices any but those who are parties to it. The creditor may transact with one of the sureties without prejudicing his right to resort to the others, but he cannot recover from the others more than the proportion they would have paid, supposing the co-surety with whom the transaction had taken place had contributed his share. "Quid autem dicemus, si debitor dederit duos fidejussores, obligatum utrumque in solidum, et creditor cum uno transegerit? Erit certé et alter liberatus in illa parte, quam creditor à transigente accepit, cum debitum extenuat" (*u*).

Although the creditor's transaction with the principal will

(*t*) Ex parte Glendenning, Buck. 517. Ex parte Carstairs, ib. 560. Boultbee *v.* Stubbs, 18 Vez. 20. Smith *v.* Winter, 4 Mees. & Wels. 454 Hall *v.* Hutchons, 3 M. & K. 426.

(*u*) Hering. de Fidej. c. 20, § 8.

discharge the surety, because, as the principal debt is discharged, so is its accessary, yet the creditor's transaction with the surety will not discharge the debtor (*v*).

"Le créancier qui transige avec la caution de son débiteur, peut la décharger seule; et alors il sera censé s'être réservé son action contre celui-ci. Mais si c'est avec le débiteur même qu'il a transigé, la transaction sera commune à la caution, parceque son obligation n'est qu'accessoire à celle du débiteur" (*w*). La loi de Transactionibus, est l'àdessas très expresse (*x*). Si fidejussor conventus et condemnatus fuisset, mox reus transegisset cum eo cui erat fidejussor condemnatus, an transactio valeat quæritur? Et puto valere quasi omni causa et adversùs reum et adversùs fidejussorem dissolutâ. Si tamen ipse fidejussor condemnatus transegit, transactio non peremit rem judicatam.

Such also is the law of England.

The creditor may release, or compound with, or give time to one co-surety, without prejudicing his right to proceed against the others, but he cannot recover from the other co-sureties more than the proportion they would have paid, supposing the co-surety released had contributed his share (*y*).

This relief it seems can only be obtained in equity; at *law* this objection would prevail, that, whatever operates to discharge one, or two, or more joint, or joint and several debtors discharges all. Thus, a creditor having taken the joint and several promissory note of his principal, and of two other persons as his sureties, as a security for the debt owing to the creditor afterwards, before the note became due, in consequence of some payment made to him by one of the sureties,

(*v*) Voet, lib. 2, tit. 15, n. 22.

(*w*) Merlin Rep. tit. Transaction, § 4.

(*x*) Dig. lib. 2, tit. 15, l. 7, § 1.

(*y*) Ex parte Gifford, 6 Ves. 805. Stirling *v.* Forrester, 3 Bli. 575, and see Dunn *v.* Slee, 1 J. B. Moo. 2. S. C. Holt. N. P. C. 399.

in satisfaction of the creditor's claim against such surety upon the note, discharged such surety, and withdrew his name from the note; it was held that the creditor had thereby lost his remedy against the co-surety (*z*).

It is established by numerous authorities, that if two are bound jointly (*a*), or jointly and severally (*b*), for the payment of an entire sum of money, a release to one may be pleaded *at law* in bar by both, and Lord Hardwicke lays it down, that such a release operates as a discharge in equity, as well as at law (*c*). Unless, therefore, this general rule is relaxed in cases arising out of the relation of principal and surety, the case of *Ex parte Gifford* must have been determined by Lord Eldon upon this circumstance, by which only it is distinguishable from the case of *Nicholson* v. *Revill*, namely, that the composition entered into with Baylis was subsequent to the proof made by Marshall and Haigh under the commission of Niblock and Burgess. This distinction was taken by Lord Harcourt, in *Ex parte Smith* (*d*), in a case where the obligee in a bond had released one of two principal debtors: the case of *Ex parte Smith* does not however appear to have been referred to in *Ex parte Gifford*. The ground on which the decision of *Nicholson* v. *Revill* proceeded was, that a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged (*e*).

Where the obligee in a joint and several bond, made

(*z*) Nicholson *v.* Revell, 4 Ad. & Ell. 675.

(*a*) Com. Dig. Pleader, 2 W. 30, and the cases cited.

(*b*) Ibid. Hammond *v.* Roll, March. 202; Co. Litt. 232, a. n. (1). Clayton v. Kynaston, 2 Salk. 573. Collins *v.* Prosser, 1 B. & C. 682. S. C. 3 Dowl. & Ry. 112. Cocks *v.* Nash, 9 Bing. 341. Ganett *v.* Jull, Selw. N. P. 377, 7th ed. Pitman. Princ. & Surety, note 193. Smith *v.* Wenter, 4 Mees. & Wels. 465.

(*c*) Bower *v.* Swadlin, 1 Atk. 294.

(*d*) 1 P. Wms. 237.

(*e*) Cheetham *v.* Ward, 1 Bos. & Pul. 630.

one of two obligors with others his executors, the action on the bond as to both obligors was discharged. As there was but one duty extending to both obligors, a discharge of one, or a satisfaction made by one, or the suspension of the right of action as to one, released, and discharged the action as to both. But in equity, a debt due from an executor to his testator, is assets in the hands of the executor for payment of the testator's debts, and for payment also of his legacies, for though the action at law is gone, the duty remains.

This might furnish a ground for considering that the relation of principal and surety excepted the case from the rule of law. This appears to have been the view taken by Baron Parke of Lord Eldon's decision in *ex parte Gifford* (*f*). Thus if there are four securities each of them being answerable as amongst themselves for the debt of his principal in equal proportions, and the creditor, without the consent of one of the co-sureties, compounds with the remaining three, the co-surety undischarged, being originally liable to make good only one-fourth part of the debt of his principal, will, upon payment of a sum equivalent to that proportion of the debt, be relieved from his responsibility as surety, and will be entitled to have credit given to him for all sums of money received or receivable, in respect of the debt for which the co-surety became answerable, until the whole sum paid by the co-surety has been repaid him (*g*).

Upon this principle, if a sheriff take a replevin bond from one surety only, and is sued by the person making cognizance, for having taken insufficient pledges, and the party distraining recover damages and costs in such action, the sheriff will not be entitled to recover against the surety on the bond, more than a moiety of the sum composing the rent,

(*f*) Smith *v.* Winter, 4 Mees. & W. p. 465. See *infra*.

(*g*) Stirling *v.* Forrester, 3 Bli. 575, and see Ex parte Gifford, 6 Ves. 805. Mayhew *v.* Crickett, 2 Swanst. 185. S. C. 1 Wils, C. C. 418.

which the party distraining established in the replevin suit. The sheriff ought to have taken, according to the statute of 11 Geo. 2, c. 19, a bond with two sureties, and if he had done so, the surety who executed the bond would have been entitled to contribution from his co-surety, and consequently would have paid only a moiety of the debt. As the single surety is, by the sheriff's conduct, deprived of his right of calling upon his co-surety, he ought only to pay one-half (*h*).

If A. and B. are sureties for C., and D. gives A. an indemnity and A. pays the whole debt for which he, together with B. became surety, and afterwards without the concurrence of D. compounds with B., A. will not be allowed to recover from D. under the indemnity, more than a moiety of the money paid by him; for, as between A. and D., A. is the principal, and D. the surety, and as A. would, if no composition had taken place, have been entitled to call upon B. for contribution, so D., upon payment of the whole debt, had the same right which by the composition is gone (*i*).

But if the creditor, when he accepts such composition, expressly reserve his remedies against the other co-sureties, he is not precluded from proceeding against them for the remainder of his debt, leaving the co-sureties to their remedy for contribution against the co-surety compounded with (*j*).

(*h*) See Austin *v.* Howard, 7 Taunt. 327. S. C. 1 J. B. Moo. 68. S. C. 2 Marsh. 352.

(*i*) Hodgson *v.* Hodgson, 2 Keen, 704.

(*j*) See Lord Eldon's judgment, in Ex parte Gifford, 6 Ves. 805.

CHAPTER IV.

RELEASE.

Acceptilation by the civil law.—Nature of.—Not retained in the codes of Holland, Spain, France, and Scotland.—Release, how made.—Express.—Presumed.—The personal release of a single debtor, or of one of several debtors *in solido*.—Effect of on co-debtors and sureties.—Personal discharge of surety.—Doctrine of the law of England.

THE obligation of the surety will be extinguished by an acceptilation between the creditor and debtor for it is regarded as a payment. It is called an imaginary payment. It was a certain formality by which the debtor asked the creditor whether he had received what the other had promised, to which the debtor answered that he had, and this operated as a release without actual payment: "Est autem acceptilatio, imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, si id velit Titius remittere, poterit sic fieri, ut patiatur hæc verba debitorem dicere: *Quod ego tibi promisi, habesne acceptum?* Et Titius respondeat, *habeo.*" (*a*)

It was a maxim of the civil law, that the consent of the parties, although it could discharge a contract which was consensual, that is, constituted by the consent alone of the parties, yet it could not discharge a contract which was real; that is, "qui re constiterit." (*b*)

In contracts of the latter description, a simple agreement by the creditor to acquit the debtor furnished him with an exception, but did not effect the extinction of the debt. (*c*)

(*a*) Inst. lib. 3, tit. 30, l. 1, § 1. Hering. de Fidejuss. cap. 20, § 5.
(*b*) Dig. lib. 50, tit. 17, l. 35.
(*c*) Inst. lib. 3, tit. 30, § 1. Dig. lib. 46, tit. 4.

By means of the Aquilian stipulation, which consisted of a mutual interrogation, the original obligation was first converted into a verbal obligation, and afterwards discharged by acceptilation (*f*).

This subtlety in the civil law is not retained in the law of Holland, Spain, France, or Scotland. A simple agreement of release between the creditor and debtor extinguishes the obligation *pleno jure*, if the creditor were capable of disposing of his property, and the debtor was not a person to whom the creditor was prohibited by law from making a donation (*g*).

A release of a debt may be made not only by an express agreement, but it may be inferred from facts which induce a presumption that the creditor has released the debtor. Thus, if a creditor restored to his debtor the writing containing the obligation, he is presumed to have released the debt: "Si debitori meo reddiderim cautionem, videtur inter nos convenisse ne peterem" (*h*).

The restitution of an article pledged for a debt is not admitted as a presumption of an intention to release the debt. (*i*)

An omission to except a particular debt in the release which is given for another debt, affords no ground for presuming a release of that which is not mentioned: "Lucio Titio cum ex causâ judicati pecunia deberetur, et eidem debitori aliam pecuniam crederet, in cautione pecuniæ creditæ non adjecit sibi *præter eam pecuniam debitam sibi ex causâ judicati:* Quæro,

(*f*) Inst. lib. 3, tit. 30, § 3.

(*g*) Grotius, Introd. l. 3, p. 41, n. 7. Groeneweg. ad Dig. lib. 46, tit. 4, l. 4, 8. Voet, lib. 46, tit. 4, n. 6. L. 1, tit. 14, Part 5. Pothier, Tr. des Oblig. part 3, c. 3, n. 607. Toullier, liv. 3, tit. 3, c. 5, n. 320. Ersk. b. 3, tit. 4, § 8.

(*h*) Dig. lib. 2, tit. 14, l. 2, § 1. Brunneman, ad lib. 2, tit. 14, l. 2. Pothier, Tr. des Oblig. part 3, c. 3, n. 608.

(*i*) Dig. ib. l. 3. Vinn. Tr. de Pactis, c. 12, n. 10.

an integræ sint utræque Lucio Titio petitiones? Paulus respondit, nihil proponi cur non sint integræ" (*j*).

So if there be a statement of mutual accounts, and one of the parties should omit to include a demand which he has upon the other, it is no presumption of that demand being released, it will be rather considered as an accidental omission, which will not deprive the creditor of his right of recovering the debt, notwithstanding it is not comprised in the account.

But such a presumption may arise when these three circumstances concur. 1st, When the debtor and creditor are nearly related, or a great friendship subsists between them. 2ndly, When not only one but several accounts have passed without any notice of the demand. 3rdly, When the creditor has died, not having made any claim. Upon such a concurrence Papinian directs that a release shall be presumed: "Procula magnæ quantitatis fideicommissum à fratre sibi debitum, post mortem ejus in ratione cum hæredibus compensare vellet, ex diverso autem allegaretur, *nunquam id à fratre, quamdiu vixit, desideratum, cùm variis ex causis sæpe in rationem fratris pecunias ratio Proculæ solvisset;* Divus Commodus cum super eo negotio cognosceret, non admisit compensationem, quasi tacitè fratri fidei-commissum fuisset remissum" (*k*).

The release may be only a personal discharge of the debtor from his obligation: "Magis eximit personam debitoris ab obligatione quàm extinguit obligationem." Although if he be the sole principal debtor, it indirectly effects an extinction of the debt (*l*).

But if there were two or more debtors *in solido*, the latter

(*j*) Dig. lib. 44, tit. 7, l. 29.

(*k*) Dig. lib. 22, tit. 3, l. 26. Brunneman, ad l. 26, lib. 22, tit. 3. Domat, de Presumpt. b. 3, tit. 6, § 4, n. 11. Pothier, Tr. des Oblig. part 3, c. 3, n. 613. Toullier, liv. 3, tit. 3, c. 5, n. 336.

(*l*) Pothier, ib. n. 617.

species of release granted to one of them only liberates that person to whom it is given, but not his co-debtor, nor does it extinguish the debt, except as to the part of the person to whom the discharge was given, and the other only remains liable for the residue (*m*).

Such a release to a principal debtor operates as a discharge of his sureties (*n*).

But this release of a surety does not discharge the principal debtor, for although there cannot be a surety without a principal debtor, yet there may be a principal without a surety (*o*).

A personal release to one surety does not discharge his co-sureties: "Fidejussoris autem conventio nihil proderit reo; quia nihil ejus interest, à debitore pecuniam non peti; imo nec confidejussoribus proderit, neque enim, quoquomodo cujusque interest. Cum alio conventio facta prodest: sed tunc demum, cum per eum, cui exceptio datur, principaliter ei, qui pactus est, proficiat; sicut in reo promittendi, et his, qui pro eo obligati sunt" (*p*).

"Si ex duobus, qui apud te fidejusserant in viginti, alter, ne ab eo peteres, quinque tibi dederit vel promiserit; nec alter liberabitur: et, si ab altero quindecim petere instituueris, nullâ exceptione summoveris; reliqua autem quinque si à priore fidejussore petere instituueris, doli mali exceptione summoveris" (*q*).

But if the co-sureties were entitled to have recourse against the one discharged, as, when they had contracted their engagement contemporaneously with him, or after him, a discharge

(*m*) Dig. lib. 2, tit. 14, l. 23; lib. 46, tit. 1, l. 15, § 1. Pothier, ib. n. 617.
(*n*) Ibid.
(*o*) Ibid.
(*p*) Dig. lib. 2, tit. 14, l. 23.
(*q*) Dig. lib. 46, tit. 1, l. 15, § 1.

granted to him liberates them in respect of the part for which, after payment of the debt, they would have had recourse against him, if he had not been discharged. And with respect to this part, they may oppose the exception *cedendarum actionum* (*r*).

By the law of England, a release can only be by deed sealed and delivered.

Where a man, by deed, acknowledges himself to be satisfied, it is a good bar without receiving any thing (*s*).

The release of the surety does not discharge the principal, nor does the release of one co-surety discharge the other co-sureties (*t*).

But at law a release to one of two joint debtors, is a release to both (*u*).

A covenant never to sue a sole debtor, or all the debtors who are jointly bound, operates as a release; but a covenant not to sue for a particular time, is no bar to an action, though it is a valid contract, and an action may be maintained for damages on the breach of it. Also, a covenant never to sue *one* of several debtors, is no defence either to the person with whom it was made, or to the others (*v*).

When a creditor covenants never to sue his debtor, the sum which the debtor is afterwards compelled to pay would be the measure of damages for an infraction of that covenant, and consequently to admit a right of action would be a mere circuity. But when the covenant is not to sue for a limited

(*r*) Pothier, Tr. des Oblig. part 3, c. 3, n. 617.

(*s*) Heath, J., 2 Taunt. 144.

(*t*) Ex parte Gifford, 6 Vez. 805. Sterling *v.* Forrester, 3 Bligh's Rep. 575.

(*u*) Bower *v.* Swadlin, 1 Atk. 294, and cases there cited. Ex parte Slater, 6 Ves. 146. Nicholson *v.* Revill, 4 Ad. & Ellis, 675.

(*v*) Dean *v.* Newhall, 8 T. R. 168.

time, if the right of action could be thereby suspended, a legal maxim would be contravened that a personal action once suspended by the act of the parties is absolutely extinct, and would defeat the right of suit not only during the limited time, but ever afterwards. Such an effect would therefore be contrary to the real intention.

CHAPTER V.

EXTINCTION OF THE OBLIGATION BY NOVATION AND DELEGATION.

I. Novation, necessary and voluntary.—Voluntary novation described.—Debts necessary to constitute it.—Not to be presumed.—There must be some difference between the two obligations.—Constitution of an annuity in lieu of former debt.—Novation may be excluded by express protestation.—The effect of novation in the case of co-debtors.—Hypothecs, &c.—Manner in which novation is made.—Novation between the heir and creditors of the deceased.

II. Delegation.—Distinguished from assignment and indication.—How made.—Effect of the original debtor guaranteeing the solvency of the person delegated.—Delegation on condition.—Effect of delegation.—Insolvency of person delegated.

III. Effect by the law of England of a creditor accepting another security from his debtor.—When it is a higher security, or a judgment, or an inferior or equal security.—Contract under seal by guarantee.—When the higher security is invalid.—Effect of delivery of a bill of exchange.—Transfer in the books of the mutual banker of debtor and creditor.—Creditor's acceptance of a third person as his debtor.—Effect of *laches* of assignee, although he did not discharge his original debtor.

THE obligation of the surety may be discharged when a new or second engagement is entered into between the creditor and the principal, or the creditor and the surety, extinguishing the former engagement.

In the civil law, and the jurisprudence of Holland, Spain, France, and Scotland, and of the State of Louisiana, this new or second engagement, if it be a change of the nature of the obligation without any change of the debtor, is called novation. If the original obligation still subsist, but the debtor is changed, that is, if the person charge himself with the original

obligation instead of the former debtor, or enter into a new obligation, it is called delegation.

By novation, in its more extended sense, is understood the new obligation which is contracted by means of a judgment obtained on the original debt or obligation. The original obligation ceases to be any longer regarded, and the only obligation is that which arises from the judgment. In this sense the novation is called *necessaria*, in contradistinction to that which is voluntary.

Voluntary novation, the subject of the present inquiry, takes place when the debtor and creditor enter into a new obligation or contract, which they consent shall be substituted in the place of, and with the intention of destroying their old or former contract or obligation. "Novatio est prioris debiti in aliam obligationem vel civilem, vel naturalem, transfusio atque translatio: hoc est, cum ex præcedenti causâ ita nova constituitur, ut prior perimatur" (*a*).

There must be two valid subsisting obligations, the one to be extinguished, and the other to be substituted for it (*b*).

Hence, if at the time of the new obligation, the former constituted no debt, or if, on the other hand, the new obligation was void, there was no novation (*c*).

The novation is valid, whatever may be the nature of the first debt, or of that substituted in its place: "Non interest qualis processit obligatio, utrum civilis an naturalis, qualis-

(*a*) Dig. lib. 46, tit. 2, l. 1. Poth. ad Pand. lib. 46, tit. 2, § 1, Art. 4, n. 1. Voet, lib. 46, tit. 2, n. 1, 2. L. 15, tit. 14, Part 5. Poth. Tr. des Oblig. part 3, c. 2, n. 581. Code Civil, Art. 1271. Toullier, des Cont. liv. 3, tit. 3, c. 5, n. 270, *et seq.* Casareg. Disc. 21, 49, 198. Stair, b. 1, tit. 18, § 8. Ersk. b. 3, tit. 4, § 22. 1 Brown's Supp. 733. Douglas, Heron, and Co., July 24, 1785, Dict. 7070. Louisiana Code, Art. 2126, 2188.

(*b*) Dig. ib. l. 8, § 1; l. 14, § 1. Voet, ib. n. 7, 9. L. 14, 16, tit. 14, Part 5. Poth. ib, n. 588. Toullier, ib. n. 270. Stair, ib. Ersk. ib.

(*c*) Ibid. Menoch de Præs. lib. 3, præs. 134, n. 45.

cumque sit novari potest, dummodo sequens obligatio, aut civiliter teneat aut naturaliter" (*d*).

The novation may take place the same instant in which the first obligation is contracted. For instance: A. sells B. an estate for a thousand pounds; by the same contract, C., a third person, engages to pay A. that sum, and A. accepts him for his debtor. It may be conceived that, during an imaginary period, there exists a debt from B. to A., of which there is a novation by the engagement of C. Although there is no space of time in which any debt from B. really exists, there is a novation which takes place the same instant that the debt is contracted (*e*).

The intention of the debtor to give, and of the creditor to accept the new in extinction of the old obligation, is essential to constitute novation. At an early period of the Roman law, such intention would be easily presumed, but by the constitution of Justinian it was required that such intention should be positively declared, without which there could be no novation. Without such declaration, the new engagement which is contracted, is to be considered rather as having been made to confirm and accede to the first, than to extinguish it.

The reason of this law is, that a person should not easily be presumed to abandon the rights which belong to him. Therefore, as a novation implies an abandonment by the creditor of the first claim to which the second is substituted, it ought not to be easily presumed, and the parties ought expressly to state it: "Si quis vel aliam personam adhibuerit, vel mutaverit, vel pignus acceperit, vel quantitatem augendam, vel minuendam esse crediderit, vel conditionem, seu tempus

(*d*) Dig. ib. l. 1, § 1. Voet, ib. n. 9. L. 16, tit. 14, Part. 5. Pothier, ib. n. 589. Toullier, ib. n. 292. Ersk. ib. Stair, ib.

(*e*) Dig. lib. 46, tit. 2, l. 8, § 2. Voet, lib. 46, tit. 2, n. 9. Pothier, Tr. des Oblig. n. 588.

addiderit, vel detraxerit, vel cautionem minorem acceperit, vel aliquid fecerit, ex quo veteris juris conditores introducebant novationes: nihil penitus prioris cautelæ innovari, sed anteriora stare, et posteriora incrementum illis accedere: nisi ipsi specialiter remiserint quidem priorem obligationem, et hoc expresserint, *Quod secundam magis pro anterioribus elegerint.* Et generaliter definimus voluntate solum esse, non lege novandum" (*f*).

This constitution has not been adopted by the law of Holland, Spain, France or Scotland. It is sufficient that the intention to extinguish the old by the substitution of the new obligation should be evident, although it is not expressed in terms (*f*).

Whenever the subsequent is inconsistent, or incompatible with the previous obligation, it must be considered as substituted for, and extinguishing the former, and therefore is a novation (*g*).

A new obligation given under a penalty, or by which the

(*f*) Cod. lib. 8, tit. 42, l. 8. Groeneweg. ad § 3, Inst. lib. 3, tit. 30. Carpz. Def. For. Part 2, const. 19, def. 14. Respons. Juris. Holl. part 2, cons. 31. Gaill, lib. 2, observ. 30, n. 3, 4, 5. Menoch. de Præsump. lib. 3, præs. 134, n. 35, *et seq.* Argentræus, ad Consuet. Britan. Art. 283, n. 16, 17. Christ. ad Leg. Mechlin. tit. 7, Art. 16, n. 4. Mascardus, de Probationibus Conclu. 1113, n. 18, *et seq.* Faber, Cod. lib. 8, tit. 28, def. 11. Neostad, Cur. Holl. Decis. 9. Respons. Juris. Holl. part 2, consil. 126, et part 3, vol. 2, consil. 92, n. 12. Voet, ad Pand. lib. 46, tit. 2, n. 3. L. 16, tit. 14, Part 5. Pothier, Tr. des Oblig. n. 594, *et seq.* Code Civil, Art. 1273. Erskine, b. 3, tit. 4, § 22. King, May 29, 1626, Dict. 11,518, Binny, Feb. 5, 1675, Dict. 7057. Callender, Feb. 9, 1677, 1 Brown's Supp. 781, and 3 ib. 130. Ardblair, July 24, 1678, Dict. 5030. Kincaids, Jan. 24, 1696, Dict. 7060. Oswald, June 26, 1711, Dict. 11,521. Ross's Crs. July 24, 1713; 5 Brown's Supp. 95. Grant, Feb. 11, 1715, Dict. 7060; 2 Bell's Com. 249. Rutherford, Feb. 25, 1785, Dict. 7069. Skinner, May 31, 1823; 2 S. & D. 354.

(*g*) Ibid. Gordon, Nov. 28, 1678, Dict. 7059. Duke of Norfolk, Feb. 14, 1752, Dict. 7062. Davidsons, June 20, 1733, Dict. 7061. Dougal, Nov. 17, 1795, Dict. 851. Bell's Cases. Mowbray, June 17, 1824; 3 S. & D. 146. Edgar, Feb. 8, 1825; 3 S. & D. 513. Erskine, ib. § 22.

debtor agrees to pay interest, or a higher rate of interest where no interest or a less rate had been reserved by the prior contract, or by which the creditor extends the time of payment, is not considered a novation (*h*).

It is the opinion of Pothier, in which Toullier concurs, that an act by which the debtor of a certain sum grants an annuity to his creditor in consideration of such sum, necessarily includes a novation. It is the essence of the constitution of an annuity, that the person who grants the annuity should receive the price of it; if then, my debtor of a certain sum, as a thousand pounds, in consideration of that debt, grants me an annuity of fifty pounds, it is necessary that he should receive the sum of a thousand pounds for the price of the annuity; and he can only be supposed to have received it by having a discharge from the former debt as a consideration for the annuity. The constitution of the annuity, therefore, includes a discharge of me from this sum: it includes a compensation of the sum of which he was my debtor, with a like sum which I was to give him for the price of the annuity. It is evident that such discharge and compensation extinguish the debt, and form a novation (*i*).

When there is a new agreement made between the same creditor and the same debtor, without the intervention of any new person, although it be expressly declared by the act which contains the new engagement, that the parties intend making a novation, yet to render it a valid novation, it is necessary that the act should contain something different from the former obligation, either in the quality of the obligation,

(*h*) Ibid. Hugo Grotius. Manud. ad. Jurisp. Holl. lib. 3, c. 43, n. 7, *et seq.* Sande. Decis, Fris. lib. 3, t. 10, def. 5. Vinn. Sel. Quæst. lib. 2, c. 42. P. Voet, ad § 1, Inst. lib. 3, tit. 30, n. 8. Resp. Juris. Holl. part 1, consil. 278. Berlich. Conclus. Pract. part 2, conclus. 25. Mascard. de Probation. Conclus. 1113, n. 9, *et seq.* Voet, lib. 46, tit. 2, n. 7.

(*i*) Poth. Tr. des Oblig. n. 595. Toullier, des Cont. n. 280.

as, if the former were determinate, and the second alternative or *vice versâ*, or in the accessary parts of the obligation, as the place of payment. It is also a sufficient difference, if the former obligation were contracted with the security of another person, or under an hypothecation, and by the new obligation the debtor engages without a surety, without hypothecation, or *vice versâ* (*j*).

If the new engagement, made without the intervention of another person, does not contain any thing different from the first, it is of no effect on the first: "Sed si eadem persona sit, à quo postea stipularis; ita demum novatio sit, si quid in posteriore stipulatione novi sit, fortè si conditio, aut fidejussor adjiciatur aut detrahatur" (*j*).

A novation by the intervention of a new debtor may be made between the creditor and the new debtor, although the first, whose debt is to be thereby extinguished, does not concur in, or consent to it: "Liberat me is, qui quod debeo promittit, etiamsi nolim" (*k*).

But although the second obligation might from its incompatibility with the former obligation, operate as a novation, yet this effect may be expressly excluded by protestation (*l*).

Novation will not take place if the second obligation be void.

The effect of novation is, that the prior obligation, together with its accessions and privileges, is destroyed.

If one of several debtors *in solido* alone contract a surety or effects with the creditor a novation of the former debt,

(*j*) Inst. lib. 3, tit. 30, § 3. Voet, lib. 46, tit. 2, n. 4, 5, 6. L. 16, tit. 14, Part 5. Poth. ib. n. 596. Toull. ib. n. 283. Bell's Principles, n. 578, and cases cited, note (*b*).

(*k*) Dig. lib. 46, tit. 2, l. 8, § 5. Voet, lib. 46, tit. 2, n. 8, 10. Poth. Tr. des Oblig. n. 598.

(*l*) Dig. ib. l. 4. Inst. lib. 3, tit. 30, § 3. Voet, ib. n. 7. Menoch. de Præsump. lib. 3, præs. 134, n. 45. Resp. Jurisc. Holl. part 1, cons. 213. Poth. ib. n. 599. Toullier, des Cont. n. 308.

the first is extinguished in the same manner as if it were a real payment, and all his co-sureties and co-debtors between them and the creditor are equally liberated with himself (*m*).

If the creditor wished to preserve the obligations of the other debtors and sureties, it would be necessary for him to make it a condition of the novation, that the co-debtors and sureties should accede to the new debt; in which case, in default of their acceding to it, there would be no novation, and the creditor would preserve his ancient claim (*n*).

From the principle, that a novation extinguishes the ancient debt, it follows also, that it extinguishes the hypothecations which are accessary to it: "*Novatione legitimè factâ liberantur* hypothecæ" (*o*).

But the creditor may, by the very act which contains the novation, transfer to the second debt the hypothecations which were attached to the first (*p*).

If the new debt were larger than the first, the creditor would preserve his right of hypothecation to the extent only of the sum which was due to him by his prior hypothec, for the transfer of the hypothecation to the new demand ought not to operate to the prejudice of intermediate creditors (*q*).

If one of several co-sureties or debtors *in solido* contract a new obligation in favour of the creditor, and it is expressed in the act that the parties intend to make a novation of the first debt, reserving the hypothecations, such reservation only affects the hypothecation of the goods of the debtor who contracts the new debt, and not those of co-sureties or his co-debtors, which cannot be hypothecated for the new debt without their consent (*r*).

(*m*) Voet, ib. n. 8.
(*n*) Cod. lib. 8, tit. 41, l. 4.
(*o*) Dig. ib. l. 18.
(*p*) Dig. lib. 20, tit. 4, l. 12, § 5. Code Civil, Art. 1278, 1279.
(*q*) Pothier, Tr. des Oblig. n. 599.
(*r*) Poth. Tr. des Oblig. ib.

Whatever reservation the creditor may make by the act which contains the novation, the sureties of the former debt cannot be obliged for the new, unless they consent to it(*r*).

By the civil law, a novation could only be made by a stipulation, but by the law of Holland, Spain, and France, it might take place by mere agreement (*s*).

A species of novation also takes place when the creditors of a deceased person give credit to his heir and accept him as their debtor, as by taking securities, mortgages, &c. By this novation they are precluded from requiring a separation of his estate from that of his ancestor (*t*).

II. *Delegatio* is novation effected by the intervention of another person whom the debtor, in order to be liberated from his creditor, gives to such creditor, or to him whom the creditor appoints, and such person so given becomes obliged to the creditor in the place of the original debtor. "*Delegare* est vice suâ alium reum dare creditori vel cui jusserit" (*u*).

The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties who makes the transfer to the other who receives it, and the person to whom the transfer is made, properly speaking, is only the procurator *in rem suam* of the creditor. Besides, the transfer only takes place between these two persons, without the consent of the debtor necessarily intervening (*v*).

(*r*) Poth. Tr. des Oblig. ib.

(*s*) Voet, lib. 46, tit. 2, n. 2. Zoes. lib. 46, tit. 2, n. 9. L. 15, tit. 14, Part 5. Poth. ib. n. 593. Code Civil, Art. 1271, *et seq.*

(*t*) Dig. lib. 42, tit. 6, l. 1, § 10, 15. Voet, lib. 42, tit. 6, n. 4. Cod. lib. 7, tit. 72, l. 2. Toullier, Tr. des Cont. n. 283. Code Civil, Art. 878, 879.

(*u*) Dig. lib. 46, tit. 2, l. 11.

(*v*) Dig. ib. l. 21, 22. Fab. Cod. lib. 4, tit. 42, def. 28. Voet, lib. 46, tit. 2, n. 12. Code Civil, Art. 1277. Pothier, Tr. des Oblig. n. 605, and p. 3, c. 1, n. 516, *et seq.*, and Tr. du Cont. de Vente, p. 6, c. 3, n. 526, *et seq.* Toull. liv. 3, tit. 3, n. 284, *et seq.* Erskine, b. 3, tit. 4, § 22. Stair,

A delegation also differs from a simple indication.

When A. the debtor indicates to B. his creditor, a person from whom he may receive payment of the money which A. owes him, and to whom A. gives him an order for the purpose, it is merely a mandate, and neither a transfer nor a novation. A. remains the debtor, and the person designated by the order does not become such in A.'s stead.

So where the creditor indicates a person to whom his debtor may pay the money, this indication does not include any novation; the debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication (*w*).

This delegation may be conditional, as when the debt in respect of which the delegation is to be made has not already been, but is to be contracted, or when upon giving another person to his creditor, the debtor undertakes that he will himself pay, if the person does not pay in a certain time. If the latter make default, it is competent for the creditor to sue his original debtor, as if no delegation had been made (*x*).

It is necessary that there should be the concurrence of the person delegating, that is, the original debtor, and of the person delegated, or the person whom he appoints (*x*).

The intention of the creditor to discharge the first debtor, and accept the second in his place, must, in order to give effect to the delegation, be perfectly evident (*y*).

If the creditor, at the request of his debtor, and at his risk,

b. 1, tit. 18, § 8. Hay, July 6, 1697, Dict. 11,520. Buchanan and Co. Feb. 19, 1779, Dict. 3402. Dudgeon, June 9, 1822; 7 S. & D. 729.

(*w*) Inst. lib. 3, tit. 30. Voet, lib. 46, tit. 2, n. 11, 12, 13. Carpz. Def. For. part 2, const. 18, def. 5, n. 7, *et seq.* L. 15, tit. 14, Part 5. Greg. Lopez, Glos. L. Pothier, Tr. des Oblig. n. 600. Code Civil, Art. 1275. Toull. liv. 3, tit. 3, c. 5, n. 284.

(*x*) Cod. lib. 8, tit. 42, l. 1, 6. Dig. lib. 46, tit. 2, l. 17. L. 15, tit. 14, Part 5. Pothier, Tr. des Oblig. n. 600. Code Civil, Art. 1275.

(*y*) Ibid. Dig. lib. 2, tit. 14, l. 40.

takes another person in his place as his debtor, the creditor is said to act *ex mandato* for his original debtor. He is entitled to indemnity if the person delegated is insolvent, but he is at the same time responsible to his debtor, if by his *lackes* in not obtaining payment the debt has become lost: "Venit in actione mandati, quod mandatario, ex causâ mandati, abest inculpabiliter" (*z*).

When the delegation is duly made, the obligation is not the less valid, although the person delegated were not in truth the debtor of the party delegating him, notwithstanding he might have believed that he was the debtor of that party. The creditor who receives no more than is due from the original debtor whom he has discharged, ought not to suffer by the mistake: "Si per ignorantiam promiserit creditori, nullâ quidem exceptione uti poterit adversus creditorem, quia ille suum recepit" (*a*).

It would be otherwise, if the person with whom the substitute contracted the obligation were not the creditor of the delegant, whether the delegant himself was in error upon the subject, and supposed him to be such, or whether he intended to make a donation. In either case, the substitute who contracts his obligation under a mistake, and upon the erroneous persuasion that he is indebted, will not be bound, and he may resist the demand, upon the error being discovered (*b*).

The reason of the difference is, that in this case the person to whom the substitute is bound, *certat de lucro captando;* whereas the other, who has engaged by mistake, *certat de damno vitando,* and more favour is always due to him, *qui certat*

(*z*) Fab. Cod. lib. 4, tit. 5, def. 1. Neostad, Cur. Holl. Decis. 38. Van Leeuwen, Cens. For. part 1, lib. 4, c. 34, n. 4. Voet, lib. 46, tit. 2, n. 13.

(*a*) Dig. lib. 46, tit. 2, l. 12.

(*b*) Dig. lib. 44, tit. 4, l. 7; lib. 39, tit. 5, l. 2, § 4; lib. 46, lit. 2, c. 12. Voet, lib. 46, tit. 2,n. 14. Pothier, Tr. des Oblig. n. 602, *et seq.* Toullier, liv. 3, tit. 3, c. 5, n. 291.

de damno, than to him *qui certat de lucro*. He ought therefore to be not only discharged from his obligation contracted under the mistake, but to recover what he has paid in consequence of it, according to the rule, "Melius est favere repetitioni, quam adventitio lucro." In the preceding case, on the contrary, the creditor to whom the substitute is obliged, *versaretur in damno*, if the substitute were discharged from his obligation (*c*).

If the substitute only obliges himself under a condition, the whole effect of the delegation will be in suspense until the condition is accomplished, and as the obligation of the substitute depends upon the accomplishment of the condition, so likewise does the discharge of the delegant from his obligation, which can only become extinct by the new obligation contracted in its stead. The obligation of the substitute to the delegant likewise depends upon the same condition; for the substitute can only be discharged from his obligation to the delegant, so far as he contracts in his stead an obligation to the creditor (*d*).

Although the substitute is not liberated as against the delegant until the accomplishment of the condition, still the delegant by whose order he has obliged himself upon such condition, cannot institute any suit against him until the condition has failed; for as long as it may take effect, it is uncertain whether the substitute will be obliged to him or to the new creditor (*e*).

As a delegation duly made contains in itself a real novation and extinction of the former obligation, it follows that the party delegating has become discharged from his debt, and the pledges, sureties, and other privileges which were annexed to the original debt no longer exist (*f*).

(*c*) Ibid.

(*d*) Inst. lib. 3, tit. 30, § 4. Voet, ib. n. 11. Carpz. Def. For. part 2, const. 18, def. 5, n. 7, *et seq.* Dig. lib. 46, tit. 2, l. 8, § 2. Pothier, ib. n. 603. Toullier, ib. n. 315.

(*e*) Dig. lib. 12, tit. 1, l. 39; lib. 46, tit. 2, l. 19; l. 12; lib. 44, tit. 4, l. 7; lib. 39, tit. 5, l. 2, § 4. Voet, lib. 46, tit. 2, n. 14. Pothier, Tr. des Oblig. n. 602, *et seq.* Toullier, liv. 3, tit. 3, c. 5, n. 291.

(*f*) Voet, ib. n. 14. Fab. Cod. lib. 8, tit. 8, def. 19, 24. Perez. de Cod. lib. 8, tit. 42, n. 13. Pothier, ib. n. 599, 600. Toullier, ib.

When the delegation is valid, that is, when the person delegated has contracted a valid obligation to the creditor, the person delegating, that is, the original debtor, is discharged, and he is not responsible to the creditor in the event of the insolvency of the debtor delegated. The creditor by accepting the latter must follow his condition: "Nomen ejus secutus est" (*g*).

But it may be agreed that the debtor shall, at his own risk, delegate another person (*h*).

III. The jurisprudence of England, and of the several States of America, except Louisiana, does not adopt the terms *novation* and *delegation*. It is a settled principle, that a mere agreement to substitute another thing in lieu of the original obligation is void, unless carried into execution, and accepted as satisfaction. No action can be maintained on the new agreement, nor can the agreement be pleaded in bar to the original demand (*i*).

But in certain cases an effect is given to obligations or contracts similar to that which is derived from novation and delegation. Thus the acceptance by a creditor of another security higher than that under which his former debt rested, is an extinguishment of the first debt, as when being a creditor by simple contract, he accepts an obligation under seal (*j*).

But this must be understood where the debtor himself enters into the securities, for a bond given by a stranger for a simple contract debt due by another, does not extinguish the simple contract debt (*k*), unless it was part of the contract that the stranger should give bond for it, or if he gave the bond in

(*g*) Fab. Cod. lib. 4, tit. 5, def. 1. Perez. ad Cod. lib. 8, tit. 42, n. 13. Voet, lib. 46, tit. 2, n. 13, 14. Pothier, ib. n. 604, *et seq.* Code Civil, Art. 1276. Toullier, ib. n. 303. Erskine, b. 3, tit. 4, § 22. Stair, b. 1, tit. 18, § 8. Linning, June 27, 1821, 1 S. & B. 90.

(*h*) Ibid.

(*i*) Lynn *v.* Bruce, 2 H. Bl. 317. James *v.* David, 5 T. R. 141.

(*j*) 6 Co. 44. Yelv. 38. 3 East, 258.

(*k*) Hooper's case, 2 Leon. 110.

pursuance of a promise made by him at the time of the contract (*l*).

If a judgment has been obtained or acknowledged on a simple contract debt, or bond, the creditor cannot afterwards bring an action for such debt or bond, for the debt is merged in the judgment, which is a security of a higher nature (*m*). But it is still only a security for the original cause of action until it is made productive by satisfaction to the party, and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have (*n*).

But the acceptance of a security of an inferior or equal degree, is in no respect an extinguishment of the first debt (*o*).

The same point was adjudged when it was pleaded that an annuity was granted in discharge of a bond (*p*).

The contract of a guarantee or surety under seal does not by operation of law extinguish the debt of the principal (*q*).

The contract of an infant for necessaries being valid, it will not be extinguished, if the party take a bond from the infant, for the infant's bond is of no validity (*r*).

Where the security which has been given for a legal subsisting debt is usurious, although the security is void, the debt is not extinguished (*s*).

The delivery of a bill of exchange or promissory note for goods sold is *primâ facie* evidence of payment for them; and it is for the creditor to show that the security has been

(*l*) Hooper's case, 2 Leon, 110.

(*m*) 6 Co. 46.

(*n*) 3 East, 257.

(*o*) Cro. Jac. 649. Cro. Eliz. 304.

(*p*) Cro. Jac. 650.

(*q*) Per Lord Kenyon, White *v.* Cuyler, 6 T. R. 177.

(*r*) Cro. Eliz. 920. Bac. Abr. tit. Extin. D.

(*s*) Barnes *v.* Headley, 2 Taunt. 184. Phillips *v.* Cockayne, 3 Camp. 119. Gray *v.* Fowler, 1 H. Bl. 462. Harrison v. Hannell, 5 Taunt. 780. S. C. 1 Marsh. 394.

dishonoured. In general, if it be dishonoured, it will not be considered payment, unless the creditor has agreed to run the risk of the bill or note which he takes in payment being bad (*t*), or unless he has by *laches* made it his own, in which case it would operate in discharge of the original cause of action (*u*).

If a bill of exchange be inadmissible on account of the stamp, the plaintiff may, having produced the bill in order to shew the impropriety of the stamp, adduce proof of his original debt (*v*).

A transfer to the account of the plantiff made according to agreement in the books of the mutual banker of the parties, will amount to payment, although the banker becomes bankrupt before any money actually passes, or even before a notice that the transfer has been made reaches the plaintiff, if the latter had previously given his assent (*w*).

If A. owe money to B., and B. owe the same sum to C., and the parties agree to the transfer, and thus A. ceases to be the debtor to B., this is equivalent to a loan by C. to A. (*x*).

The assent of the debtor is essential, for he may have an account against the assignor, and choose to insist on his set off; but if there be any thing like an assent on the part of the holder

(*t*) Kearslake *v.* Morgan, 5 T. R. 515. Thomas *v.* Heathorn, 2 Bar. & Cres. 478. Owenson *v.* Morse, 7 T. R. 64. Fry *v.* Hill, 7 Taunt. 397. Swinyard *v.* Bowes, 5 M. & S. 62. Everett *v.* Collins, 2 Campb. 515. Marsh *v.* Pedder, 4 Camp. 257. Brown *v.* Kewley, 2 Bos. & Pul. 518. Hickling *v.* Hardey, 7 Taunt. 312. Goodwin *v.* Coates, 1 M. & Rob. 221. Robinson *v.* Read, 9 Bar. & Cres. 449. Rogers *v.* Langford, 1 Cromp. & Mees. 637. Howes *v.* Ball, 7 Bar. & Cres. 481.

(*u*) Camidge *v.* Allenby, 6 Bar. & Cres. 373. Alderson *v.* Langdale, 3 Bar. & Adol. 660. Chit. Bills, 197. Bayley, Bills, 232.

(*v*) Brown *v.* Watts, 1 Taunt. 353. Stewart *v.* Mason, ib. 354. Milbourne *v.* Ewart, 5 T. R. 381.

(*w*) Eyles *v.* Ellis, 4 Bing. 112. S. C. 12 B. Moore, 306. Bolton *v.* Richard, 6 T. R. 139. Bodenham *v.* Purchas, 2 Bar. & Ald. 39.

(*x*) Wade *v.* Wilson, 1 East, 195.

of the money, it seems that the latter may be considered the debtor (*y*).

Where a bond is assigned by the obligee towards satisfaction of a debt owing from him to another person, the assignee is chargeable for wilful default in forbearing the obligor, to the amount of any loss incurred by such forbearance (*z*).

(*y*) Per Lord Ellenborough, in Surtees *v.* Hubbard, 4 Esp. 203.

(*z*) Ex parte Mure, 2 Cox, Cas. 63. Williams *v.* Price, 1 Sim. & Stu. 583.

CHAPTER VI

EXTINCTION OF THE OBLIGATION BY COMPENSATION.

I. Nature of under the Civil Law.—Holland, Spain, France.—Operates *pleno jure* as an extinction.—If there are two debts, it takes place as to that which it is most for the benefit of the debtor should be discharged.—Compensation considered as payment.—Debts to which compensation may be opposed.—Debts which may be opposed in compensation.—In what respects the law of Scotland differs from the civil law.

II. Compensation or set off not known to the common law of England.—Admitted by Statute.—The difference between set off and compensation in its effect on the debt

III. In Jamaica, and in other colonies, except those which retain the laws of Holland, Spain, or France, and in the several States of America, except Louisiana, the set off of mutual debts similar to that introduced by the English statute is admitted.

I. ANOTHER mode by which the obligation of the surety is extinguished is that which, in the civil law, and the law of Holland, Spain, and France, is called compensation. It is "debiti et crediti inter se contributio" (*a*). The debts of which two persons are the debtors, are extinguished by the credits of which they are respectively creditors. The credit to which the surety is entitled with the creditor, or to which the principal is entitled with the creditor, extinguishes the obligation of the surety (*b*).

(*a*) Heinec. Antiq. lib. 3, tit. 13, n. 2. Pensare rem aliquam cum aliquâ. Dig. lib. 16, tit. 2, l. 1. Pothier, Tr. des Oblig. n. 623. L. 20, tit. 14, Part 5. L. 1, tit. 28, lib. 11, Nov. Recop. Voet, lib. 16, tit. 2, n. 1, 2. Coutume de Paris, Art. 105. Code Civil, Art. 1290, *et seq.* Merlin Rep. tit. compens.

(*b*) Hering. de Fidejus. c. 20, § 6.

This extinction is effected *pleno jure*, that is, by operation of law, without being pronounced by the judge or opposed by the parties: "Compensationes ex omnibus actionibus ipso jure fieri sancimus" (*c*). Vicem solutionis obtineat, adeoque pro ratâ debitum utrumque ipso jure minuatur" (*d*).

As soon as the person who was the creditor of another becomes his debtor in a sum of money, or other demand, which may be the subject of compensation with that of which he was his creditor, and *vice versâ*, as soon as a person who was debtor of another becomes his creditor in a sum which may be the subject of compensation with that of which he is debtor compensation takes place, and the respective debts are immediately extinguished by operation of law to the extent of their concurrence. Thus, if A. be indebted to B. in a sum which carried interest, and B. afterwards becomes indebted to A. in a sum which did not from its nature carry interest, A.'s debt would be held discharged to the extent of the mutual credit, from the time of such credit taking place, and interest only would be due on the balance from that time: "Cum alter alteri pecuniam sine usuris, alter usurariam debet, constitutum est à Divo Severo, concurrentis apud utrumque quantitatis usuras non esse præstandas" (*e*).

The credit, which will thus stop interest on the debt, must be determinate. Thus, if A. were the creditor of B. in 100*l.* which carried interest, and B. became the heir of C. who left A. a sum of 100*l.* or a pair of horses, at A.'s choice, the interest on the 100*l.* due to A. would not cease from the day of C.'s death, on which B. became debtor for the legacy, but only from the day when A. declared his choice of the 100*l.*, because from that day only the compensation takes place:

(*c*) Ibid. Cod. lib. 4, tit. 31, l. 14. Dig. lib. 16, tit. 2, l. 21.

(*d*) Cod. lib. 4, tit. 31, l. 4, 12. Dig. lib. 20, tit. 4, l. 4; lib. 40, tit. 12, l. 19. Voet, lib. 16, tit. 2, n. 2. Poth. Tr. des Oblig. n. 635. Toullier, liv. 3, tit. 3, c. 5, n. 5.

(*e*) Dig. lib. 16, tit. 2, l. 11. Cod. lib. 4, tit. 31, l. 4.

"Si debeas decem millia, aut hominem, utrum adversarius volet, ita compensatio hujus debiti admittitur, si adversarius palam dixisset, utrum voluisset" (*d*).

So effectually is the debt extinguished, that if A. being indebted to B. to whom he had granted an hypothec, afterwards becomes the creditor of B., A. may reclaim the property hypothecated on offering the balance, if any, to B. "Invicem debiti compensatione habitâ, si quid amplius debeas, solvens, vel accipere creditore nolente offerens, et consignatum deponens, de pignoribus agere potes" (*e*).

As compensation is in lieu of payment, if A. is indebted to B. on two different accounts, the compensation takes place as to that debt which it is most for the interest of A. should be discharged, provided both the debts owing by A. were contracted before he became the creditor of B. If A. had owed B. 100*l.* and became B.'s creditor for 100*l.* and afterwards contracted another debt to B., the compensation will not be deemed to have extinguished the latter debt, however much it may be A.'s interest to have it first discharged (*f*).

So completely does compensation operate as payment, that if a creditor demand from his debtor the whole sum for which he was creditor, without deducting the amount for which he is debtor, he incurred the penalty of an excessive claim: "Si totum petat, plus petendo causa cadet." And if A. being indebted to B. in a certain amount, but being also a creditor of B. to the same amount, pays him the whole amount of his

(*d*) Dig. lib. 16, tit. 2, l. 22; lib. 20, tit. 4, l. 4. Cod. lib. 4, tit. 31, l. 4. Poth. Tr. des Oblig. n. 629, 636. Voet, lib. 16, tit. 2, n. 2, 17. Fab. Cod. lib. 4, tit. 23, def. 4; lib. 8, tit. 24, def. 2. Hugo Grotius, Manud. ad Jurisp. Holl. lib. 3, c. 40, n. 10, 11. Zoes. ad Pand. lib. 16, tit. 2, n. 32, *et seq.* Carpz. Def. For. Part 1, const. 8, def. 6, in fine, def. 15. Respons. Jurisc. Holl. part 3, vol. 1, consil. 47. Neostad, Sup. Cur. decis. 3, 95. Van Leeuwen, Cens. For. Part 1, lib. 4, c. 36, n. 2, 6, 7.

(*e*) Cod. lib. 4, tit. 31, l. 12.

(*f*) Pothier, ib. n. 638.

demand, he may recover the sum which he has thus paid by the *condictio indebiti*: "Si quis igitur compensare potens, solverit, condicere poterit, quasi indebito soluto" (*g*).

The debts to which compensation may be opposed are of a certain sum of money, or a certain quantity of corn, oil, wine, or other fungible or consumable thing. Compensation may be opposed to an indeterminate thing of a specific kind, although not of a consumable nature. Thus, if A. undertake upon a contract of sale to deliver a horse to B., without mentioning any particular horse, and B. becomes the sole heir of a person who had bequeathed a horse to A. indeterminately, the horse due to A. under the will may be opposed by him as compensation in respect of the horse which he was bound to deliver under the contract. But where on the contrary a thing, although in its nature consumable, is due as a specific and determinate object, the debt does not admit of compensation (*h*).

It may be opposed to a debt due by judgment, or to costs awarded: "Ex causâ quidem judicati si debitum solum repeti non potest, ea propter nec compensatio ejus admitti potest. Eum vero, qui judicati convenitur, compensationem pecuniæ sibi debitæ implorare posse, nemini dubium est" (*i*).

In cases of spoliation and deposit there can be no compensation opposed to the demand for restitution of the thing of which the owner has been plundered (*j*), or which had been deposited, unless in the case of deposit, the demand of the depositary is for the expenses incurred by him in the pre-

(*g*) Dig. lib. 16, tit. 2, l. 10, § 1.

(*h*) Voet, lib. 16, tit. 2, n. 17, 18. Zoes. ad Dig. lib. 16, tit. 2, n. 11, 14. Vinn. Sel. Quæst. lib. 1, c. 50. Wissenb. ad Dig. lib. 16, tit. 2, n. 1.

(*i*) Cod. lib. 4, tit. 31, l. 2. Dig. lib. 16, tit. 2, l. 10, § 2. Charond. Resp. lib. 11, resp. 83, in fine. Faber, Cod. lib. 4, tit. 23, def. 9, n. 12. Ibid. lib. 7, tit. 18, def. 29. Christin. ad Leg. Mechlin. tit. 1, Art. 24, in notis ad n. 13. Carpz. Def. For. Part 1, const. 31, def. 19. Voet, ib. n. 14.

(*j*) Cod. lib. 4, tit. 34, l. 11. Zang. de Except. part 3, c. 8, n. 119.

servation of it, and which he is entitled to set up as a subject of compensation (*k*).

A claim to future maintenance given by contract or bequest does not admit of being discharged by compensation (*l*).

"Compensatio debiti ex pari specie, licet ex causâ dispari admittitur." Thus to a sum of money which A. owes B., A. may oppose a sum owing to him by B. These debts are *ex pari specie* (*m*).

A debt of an indeterminate thing of a certain kind cannot be opposed to a debt of a certain specific thing of the same kind, but a debt of a specific thing can be opposed to a general debt of the same kind (*n*). Thus, if A. is creditor of B. for six pipes of wine generally, and B. is the creditor of A. for six pipes of wine of a particular vintage, A.'s demand against B. is compensated by that of B. against A. But if B. made his demand against A., the latter could not compensate it by the demand which he, A., has against B., because B. is not obliged to receive from his debtor any thing in lieu of that which the debtor owes him: "Aliud pro alio invito creditori solvi non potest" (*o*). "Creditor compensare non cogitur, quod alii quàm debitori suo debet: quamvis creditor ejus pro eo, qui convenitur ob debitum proprium, velit compensare" (*p*).

The debt must be fully due. If therefore the time for pay-

(*k*) Voet, lib. 16, tit. 2, n. 15, and lib. 13, tit. 6, n. 10. Dig. lib. 16, tit. 3, l. 24, 25. Vinn. Sel. Quæst. lib. 1, c. 51. Poth. Tr. des Oblig. n. 625.

(*l*) Dig. lib. 5, tit. 2, l. 27, § 3; lib. 42, tit. 1, l. 2; lib. 49, tit. 5, l. 7. Fab. Cod. lib. 4, tit. 23, def. 7. Zang. de Except. part 3, c. 8, n. 28, 29. Carpz def. For. Part 1, const. 8, def. 9. Voet, lib. 16, tit. 2, n. 16.

(*m*) Pothier, Tr. des Oblig. n. 626. Voet, ib. n. 18.

(*n*) Dig. lib. 16, tit. 2, l. 10, 11, 12. Cod. lib. 4, tit. 31, l. 4, 8. Zoes. ad Pand. lib. 16, tit. 2, n. 14. Wissenbach, ad Dig. lib. 16, tit. 2, n. 1. Voet, ib. n. 18.

(*o*) Dig. lib. 12, tit. 1, l. 2, § 1.

(*p*) Dig. lib. 16, tit. 2, l. 18, § 1.

ment, according to the contract of the parties, has not arrived, the debt is not demandable (*q*): "Quod in diem debetur, non compensabitur, antequam dies venit, quanquam dari oporteat" (*r*).

This rule is not extended to the time or indulgence which is granted to the debtor by the terms of the judgment obtained against him (*s*): "Aliud est diem obligationis non venisse, aliud humanitatis gratiâ tempus indulgeri solutionis" (*t*).

The debt must be liquidated, that is, its amount must be certain, and it must not be such a disputed account as cannot at the trial be promptly and clearly ascertained (*u*).

The debt must be determinate. Thus, if A. be indebted to B. in 100*l.* and B. is the heir of C., who has charged him to give A. 100*l.*, or a pair of horses, the bequest cannot be opposed by A. until B. has made his election to give A. 100*l.* (*v*).

The debt must be due to the very person who opposes it as a compensation. A. cannot oppose in compensation a debt owing to him as tutor or curator of C. against a debt owing by him in his individual character: "Ejus, quod non ei debetur, qui convenitur, sed alii compensatio fieri non potest" (*w*).

So the debt opposed in compensation must be due from the same person to whom it is opposed. A. is the debtor of B. individually, but the creditor of B. in his character of tutor, or B. in his character of tutor, is the creditor of A., but the debtor of A. individually. The debt due by or to the tutor

(*q*) Voet, ib. n. 17.
(*r*) Dig. lib. 16, tit. 2, l. 7.
(*s*) Voet, lib. 16, tit. 2, n. 17. Pothier, Tr. des Oblig. n. 627.
(*t*) Dig. ib. l. 16, § 1.
(*u*) Cod. lib. 4, tit. 31, l. 14, § 1. Voet, lib. 16, tit. 2, n. 17. Zoes. ad Dig. lib. 16, tit. 2. Van Lecuwen, Cens. For. Part 1, lib. 4, c. 36, n. 3. Code Civil, Art. 1291.
(*v*) Dig. lib. 16, tit. 2, l. 22.
(*w*) Cod. lib. 4, tit. 31, l. 9.

in that character cannot be compensated by the debt due by or to him individually: "Id, quod pupillorum nomine debetur, si tutor petat, non posse compensationem objici ejus pecuniæ, quam ipse tutor suo nomine adversario debet" (*x*).

As a person to whom the rights of a creditor are ceded is in effect a creditor when he has given notice to the debtor of the transfer of the debt, he may oppose the compensation of such a debt against a demand on him by the debtor. "In rem suam procurator datus si vice mutuâ conveniatur, æquitate compensationis utetur" (*y*).

A surety may oppose in compensation not only a debt owing by the creditor to himself, but also what is due by the creditor to the principal debtor: "Si quid à fidejussore petetur, æquissimum est, eligere fidejussorem, quod ipsi, an quod reo debetur, compensare malit; sed et, si utrumque velit compensare, audiendus est" (*z*).

But the principal cannot oppose to his own creditor the compensation of a debt owing by the latter to his surety (*z*).

If the debtor acquires a demand against his creditor before he has notice of the assignment of the debt, he is entitled to oppose in compensation such demand, as well as any debt owing to him by the assignee. But if the credit is acquired after notice of the assignment, it cannot be opposed in compensation, because by such notice the assignor ceased to be the creditor of his original debtor (*a*).

The right to oppose in compensation a credit acquired previously to the assignment is barred, if the debtor with full

(*x*) Dig. ib. l. 23. Voet, ib. n. 8. Pothier, ib. n. 630, 632. Toullier, liv. 3. tit. 3, c. 5. n. 375.

(*y*) Dig. lib. 16, tit. 2, l. 18. Voet, lib. 16, tit. 2, n. 8. Pothier, Tr. des Oblig. n. 630.

(*z*) Dig. lib. 16, tit. 2, l. 5. Pothier, ib. n. 631. Hering. de Fidejuss. c. 20, § 6.

(*a*) Pothier, ib. n. 632.

knowledge of his right purely and simply assents to such assignment (*b*).

It is no objection to the compensation that the debt opposed in compensation is payable in a place different from that where the debt against which it is opposed is payable, but if there was any expense incurred in remitting it from the one place to the other, such expense must be allowed by the party opposing it (*bb*).

The principal of an annuity which A. owes to B. cannot be opposed by B. in compensation of a debt which he owes, but he may oppose the arrears which have accrued. The principal of an annuity is not properly due, it is only *in facultate luitionis* (*c*).

Compensation was not admitted by the common law of Scotland. It was only allowed by the act 1592, c. 141.

The debts must be of the same nature. An obligation to deliver grain or goods cannot be set off against a pecuniary obligation (*cc*); but a claim of damage in the carriage of goods may be set off against freight (*d*).

The debts must both be due. There can be no compensation between a present debt, and one that is future and contingent (*e*).

They must both be liquid; it is, however, sufficient that the debt can be instantly verified by writ or oath (*f*).

(*b*) Pothier, ib. n. 632.

(*bb*) Dig. lib. 16, tit. 2, l. 15.

(*c*) Pothier, ib.

(*cc*) Ersk. b. 3, tit. 4, § 15. Elliott, July 1, 1631, Dict. 2649. Tulliallan, June 17, 1664, Dict. 2559.

(*d*) Taylor, Dec. 2, 1830, 9 S. & D. 113.

(*e*) Ersk. ibid.

(*f*) Ersk. ib. § 16. Sligo, Feb. 28, 1777, 5 Brown's Sup. 420. Seton, Nov. 20, 1683, Dict. 2566. Brown, Jan. 14, 1686, Dict. 2566. M'Dowal, July 31, 1707, Dict. 2568. Ross, Feb. 13, 1711, Dict. 2568. Edwards, May 24, 1821, 1 S. & D. 27. Grierson, Dec. 6, 1 S. 91. Mitchell, June 4, 1822, ib. 451. M'Neil, July 2, 1824, 3 S. & D. 204. Ewing. Dec. 13, 1825, 4 ib. 310. Dickson, Nov. 25, 1826, 5 ib. 43. Fisher,

The parties must be debtor and creditor, each in his own right, and at the same time (*g*); and a factor will be held as principal to this effect, where he has sold goods consigned to him without notice to the buyer of his being only a factor (*h*).

If one has an interest in extinguishing the debt claimed, he may plead compensation (*i*).

There is no compensation in deposits (*j*), nor if there has been a specific appropriation, as in the case of a bill given to a banker for discount, or sent for payment (*k*). A debt prescribed cannot compensate a debt not prescribed, unless upon a reference to oath in the short prescriptions (*l*). A debt acquired after bankruptcy cannot compensate a debt previously due (*m*).

June 5, 1829, 7 ib. 704. Downe, June 24, 1829, 3 W. & S. 472. Thompson, Dec. 18, 1829, 8 S. & D. 267. M'Kenzie, Feb. 4, 1830, ib. 436. Hagart, June 3, 1830, ib. 852. Cork, July 7, 1830, ib. 1025.

(*g*) Ersk. ib. § 13. Ferguson, Dec. 28, 1711, Dict. 2659. Mackie, Nov. 29, 1774, Dict. 2575. Auld, July 5, 1810, F. C. Pearson, March 10, 1814, F. C. Wilson, May 17, 1822, 1 S. & D. 417. Lumsden, Dec. 16, 1823, 2 S. & D. 585. Campbell, Nov. 13, 1823, 2 S. & D. 484. M'Leay, July 9, 1825, 4 S. & D. 161. Hay, Dec. 22, 1825, ib. 344. Menzies, June 22, 1826, 4 S. & D. 747. Anderson and Co., Feb. 26, 1829, 7 S. & D. 462. Fleming, Jan. 29, 1832, 10 S. & D. 739.

(*h*) Belches, Jan. 31, 1770, Dict. tit. Compens. App. n. 1. Baxter, Dec. 11, 1800, ib. n. 4. Hitchiner, Dec. 8, 1803, Dict. 14,206. Johnston, Nov. 14, 1818, F.C.

(*i*) M'Bride, Jan. 7, 1680, Dict. 2570. Town of Aberdeen, July 1, 1709, Dict. 2570. Rae, June 30, 1738, Dict. 2571. Middleton, Feb. 26, 1743, Dict. 2573.

(*j*) Stair, b. 1, tit. 13, § 8. Ersk. b. 3, tit. 4, § 17, 18. Campbell, Dec. 11, 1781, Dict. 2665.

(*k*) Douglas, Dec. 8, 1699, Dict. 2624. Stewart, Feb. 16, 1770, Dict. Compens. App. 2. 1 Hailes, 342.

(*l*) Carmichael, July 1719, Dict. 2677. Baillie, Aug. 10, 1753, Dict. 2680. Clarke, Aug. 6, 1773, Dict. 2665.

(*m*) Crawford, Feb. 8, 1662, Dict. 2613. Mauswell, Feb. 14, 1662, Dict. 2614. Cauven, June 18, 1783, Dict. 2581. Mill, Nov. 22, 1825, 4 S. & D. 219.

Compensation must be pleaded (*n*), for it has no effect *ipso jure*, and it does not therefore stop prescription (*o*). It must be pleaded before decree; not being competent by suspension after judgment pronounced (*p*). Even where the decree is in absence, the general rule holds (*q*); but it has been sometimes relaxed (*r*). It is competent to be stated by suspension against a decree of registration (*s*) in cases of insolvency, or where the party is *vergens ad inopiam* (*t*). But when pleaded, it operates retrospectively to the period of concourse, and so stops interest (*u*).

II. The common law of England did not allow a defendant to oppose as a defence to the demand of the plaintiff any debt which he owed the latter, whether it exceeded, or was equal to, or less than the plaintiff's demand.

But if the nature of the employment, transaction, or dealings necessarily constituted an account consisting of receipts and payments, debts and credits, the balance only was considered the debt, and could only be recovered (*v*). This obvious defect in the law was first remedied in the case of bankrupts, and afterwards in cases where there was no bankruptcy (*w*).

(*n*) Grahame, Nov. 3, 1693, 4 Brown's Sup. 86.

(*o*) Stair, b. 1, tit. 18, § 6, corrected by Erak. b. 3, tit. 4, § 12. Maxwell, Nov. 15, 1738, Dict. 2550. Baillie, Aug. 10, 1753, Dict. 2680. Cleland, Feb. 5, 1669, Dict. 2682.

(*p*) Martin, Dec. 12, 1632, 1 Brown's Sup. 78. Nicoll, July, 12, 1664, 2 Brown's Sup. 340. Logan, Feb. 5, 1678, Dict. 2641. Brown, Feb. 6, 1694, 4 Brown's Sup. 142. Gordon, July 9, 1697, Dict. 2642. Anderson, July 20, 1739, Dict. 2646.

(*q*) Paterson, Dec. 9, 1742, Dict. 2646. Cunningham, Jan. 17, 1809, F.C.

(*r*) Corbet, March 21, 1707, Dict. 2644. Baillie, June 29, 1733. Elch. Comp. 1. A. v. B. Feb. 25, 1747, Dict. 2648. S. C. Monb. 5. Brown's Sup. 747.

(*s*) Hill, Nov. 23, 1822, 2 S. & D. 35.

(*t*) Barclay, Jan. 1683, Dict. 2641. M'Laren, Feb. 18, 1736, Dict. 2646.

(*u*) Cleland, *ut supra*. Campbell, July 23, 1757, Dict. Tack. App. 1.

(*v*) Green *v.* Farmer, 4 Burr. 2214.

(*w*) 4 Ann, c. 17, § 11. 2 Geo. 2, c. 22. 5 Geo. 2, c. 30, § 28.

In any actions where there are mutual debts, the defendant may set off the debt due to himself against that for which he is sued. The set off introduced by these statutes very much resembles the compensation which has been just considered; but there is this material difference, that the debts are not in themselves and of right balanced and extinguished, but the right of set off is merely a defence to an action for the debt, and the defendant is not obliged in any instance to avail himself of his right, but may at his option pay, or on other grounds contest the one debt, and bring a separate action for the other (*x*). If the creditor to whom the larger debt is due brings an action, in which the other does not set off his mutual demand, but brings a counter action, the debt due to the first may be set off in the action by the last, and is not extinguished by his first obtaining a verdict for his whole debt, and he may take advantage of it in the action against him, remitting so much of what he has recovered as will reduce it to the balance (*y*).

As the contract of suretyship is a contract of indemnity to pay on the default of the principal, there is no *absolute debt*, but an undertaking to pay what may be due from the principal. Until the amount is ascertained, the creditor's claim is no other than a claim for unliquidated damages, and is not the subject of a set off within the statute 2 Geo. 2, c. 22 (*z*). If A. sues B. at law for a debt, and at the time of the action brought, A. had become liable to B. as a surety for C., on account of monies advanced by B. at A.'s desire, which, though he had been requested by B. to pay, had not been paid, the demand of B., as surety, being unliquidated and unascertained, is not a *debt* within the meaning of the statute, and cannot in that action be set off by B. against A.'s

(*x*) Pitts *v.* Carpenter, 1 Wilson, 16.
(*y*) Baskerville *v.* Brown, et e contra, 2 Burr. 1229.
(*z*) Sect. 13.

demand (*a*). On the other hand, if B. is the surety, and A. the party to whom the guarantee is given, and A. sues B. upon his guarantee, under which B. had become liable, B. cannot, if a sum of money is owing to him from A., set off that sum against the demand made by A. against him upon the guarantee, for the demands are not *mutual debts* (*b*). But if it had been agreed between the party to whom the guarantee had been given and the surety, that the surety should pay in respect of his liability under the guarantee, a stipulated sum in the nature of liquidated damages, so that the intervention of a jury for the purpose of ascertaining the amount of damages which the former had sustained became unnecessary; it seems, that the sum fixed upon and admitted as the specified amount of the surety's liability, might be considered in the nature of an account stated, and, therefore, a set off would be allowed (*c*).

If the principal, in a proceeding by the creditor, could claim *in equity* a right of set off, the surety is entitled to the same benefit, inasmuch as a proceeding against the surety is in effect a proceeding against the principal, who must indemnify the surety. Thus, if a bill of exchange is drawn by D. upon A., which A. accepts for the accommodation of D., and D. discounts the bill with his bankers, who become bankrupts before its maturity, having in their hands at the time of their bankruptcy the bill of exchange, and also a cash balance of the drawer, the bill of exchange will be ordered to be given up in

(*a*) Morley *v.* Inglis, 4 Bingh. N. C. 58. Crawford *v.* Stirling, 4 Esp. 207, and see Howlet *v.* Strickland, Cowp. 56. Weigall *v.* Waters, 6 T. R. 488.

(*b*) Sampson *v.* Burton, 2 Brod. & B. 89; S. C. 4 J. B. Moo. 515. Grant *v.* The Royal Exchange Assurance Company, 5 M. & Sel. 439. Hardcastle *v.* Netherwood, 5 B. & Ald. 93.

(*c*) See Weinbrok *v.* Roberts, 2 Camp. 586. Thorpe *v.* Thorpe, 3 B. & Ad. 580. Fletcher *v.* Dyche, 2 T. R. 32, and the observations of Tindal, C. J., in Morley *v.* Inglis, 4 Bing. N. C. 58.

reduction of the cash balance, leaving the drawer at liberty to prove for the difference; for if an action had been brought against D., he would have had the same benefit of a set off, and he ought to have the same benefit, if the action were brought against A., who being merely D.'s surety, would have to be repaid by D. (*d*).

If the creditor is the purchaser of an annuity, and a power is reserved to the grantor to re-purchase it upon certain terms, the surety has a right to this power, and may become the purchaser of the annuity upon the like terms (*e*). If from inadequacy of consideration, or from any other cause, the principal can claim relief in a Court of law or equity in respect of the annuity, the same relief will be afforded to the surety (*f*).

The assignees of the principal debtor, who has become bankrupt, are bound by the agreements which he had made before his bankruptcy. A. had become bound in a bond as surety for B., and B., in order to indemnify A., agreed that he should retain out of any money that might be due from him to B., in respect of any dealings between them in trade, so much as he (A.) should pay on the bond. B. afterwards sold goods to A. of a less value than the money secured by the bond, and then became bankrupt, and A. was obliged to satisfy the bond. The payment of the money secured by the bond was held a good defence to an action by the assignees of B. against A., for the price of the goods (*g*). A factor who becomes surety for his principal in the course of his dealings, and within his authority as factor, has a lien on the price of the goods sold by him for his

(*d*) Ex parte Hippins, 2 Glyn & Ja. 93. Ex parte Hanson, 12 Ves. 346. Ex parte Stephens, 11 Ves. 24, and see Bolland *v.* Nash, 8 B. & Cress. 105. Collins *v.* Jones, 10 B. & Cress. 777.

(*e*) Capel *v.* Butler, 2 Sim. & S. 457.

(*f*) See Underhill *v.* Horwood, 10 Ves. 209.

(*g*) Dobson *v.* Lockhart, 5 T. R. 133.

principal to the amount of the sum for which he has so become surety (*h*). But if a broker purchasing goods for his principal does, without his knowledge or authority, add to the terms of the purchase, which the principal had agreed to, by himself guaranteeing the principal's bills, and the goods are delivered to the broker, and the principal becomes bankrupt, the broker can neither detain the goods as upon a stoppage *in transitu*, nor has he any lien on them for the money he has paid on his guarantee, notwithstanding the bankrupt never could have obtained the goods purchased unless such guarantee had been given (*i*).

According to the doctrine of the civil law, it has been seen that a creditor is obliged to restore the pledge, upon contracting a debt to an equal amount, or upon contracting a debt to a smaller amount, and an offer of the balance. But the right of set off produces no such effect. It is merely a matter of defence, and is not in any case the foundation of a claim.

In the law of England, as in the civil law, the right of compensation or set off is confined to debts; one injury cannot be balanced against another, nor an injury against a debt (*j*). Neither can unliquidated damages for not performing an agreement be set off, either against another demand of a similar nature or a debt (*k*).

In the case of a bond for the payment of money, the principal secured, and not the penalty of the bond, is for the purposes of set off considered as the debt (*l*). By setting off any money due under such a bond (as the arrears of an annuity) the bond is not extinguished. But certain stipulated damages which are

(*h*) Drinkwater *v.* Goodwin, Cowp. 251.

(*i*) Gurney *v.* Sharp, 4 Taunt. 242.

(*j*) Freeman *v.* Hyatt, 1 Bl. Rep. 394.

(*k*) Howlett *v.* Strickland, Cowp. 56. Weigall *v.* Waters, 6 T. R. 488. Bull. N. P. 180, 181.

(*l*) 8 Geo. 2, c. 24.

precisely due according to the terms of the contract, or a penalty to which the defendant has become absolutely entitled, may be set off, for these are certain, liquidated debts (*m*).

The mutual debts must be due in the same right, and therefore a person cannot set off a demand in his own right against one for which he is sued as executor, or the reverse (*n*).

If a debt is due to or from several persons jointly, there can be no set off on account of the debt of either of them singly; and a debt to or from a man in his own right cannot be set off against a debt in right of his wife.

An assignee cannot retain a dividend due to one of the creditors by setting off a debt from the creditor to himself (*o*).

But where two persons are indebted jointly and severally, that engagement, as being several, may be set off against the debt claimed by either of them individually (*p*). So a debt from or to a surviving partner may be set off against that for which he sues, or is sued, on his own account (*q*).

The set off can only be maintained for such debts as were due at the commencement of the action (*r*).

The defendant is not precluded from setting off an adverse claim subsequently accruing, although by the express agreement the goods were to be sold on ready money terms (*s*). The purchaser is entitled to set off a debt due to him from the factor from whom he has bought the goods, where the factor has acted in his own name, and represented himself as

(*m*) Fletcher *v.* Dyche, 2 T. R. 32.

(*n*) 2 Geo. 2, c. 22, § 13.

(*o*) Brown *v.* Bullen, Doug. 407.

(*p*) Fletcher *v.* Dyche, 2 T. R. 32.

(*q*) Slipper *v.* Stidstone, 5 T. R. 493. French *v.* Andrade, 6 T. R. 582.

(*r*) Evans *v.* Prosser, 3 T. R. 186.

(*s*) Cornforth *v.* Rivett, 2 M. & S. 510. Eland *v.* Karr, 1 East, 375. M'Gillivray *v.* Simpson, 9 Dow. & Ry. 35. S. C. 2 Car. & P. 320. Taylor *v.* Okey, 13 Ves. jun. 180. Lechmere *v.* Hawkins, 2 Esp. 626.

principal (*t*), unless collusion can be proved (*u*). If the purchaser ascertains at any time before the contract is completed that the party with whom he is dealing acts in a representative character only, and not as principal, his right of set off will be barred (*v*).

III. In Jamaica and the other British colonies mentioned below, acts similar to the English statutes of set off are in force (*w*).

In the several states of America, except Louisiana, the set off of mutual debts is allowed under acts of their legislatures resembling the English statutes of set off.

(*t*) Carr *v.* Hinchcliffe, 4 Bar. & Cress. 547. S. C. 7 Dow. & Ry. 42. George *v.* Claggett, 7 T. R. 359. Rabone *v.* Williams, 7 T. R. 360, n. Bayley *v.* Morley, ib. Ross *v.* Decy, 2 Esp. 469, n.; Waring *v.* Favenck, 1 Camp. 85.

(*u*) Eastcot *v.* Milward, 7 T. R. 361, n.

(*v*) Moore *v.* Clementson, 2 Camp. 24.

(*w*) Jamaica Act, 10 Geo. 3, c. 1, § 1. Barbadoes Act, No. 183. Antigua Act, No. 475, cl. 41. Nevis Act, No. 163. Grenada Act, No. 62, cl. 44. St. Christopher's Act, No. 110. Dominica Act, No. 37, cl. 17. St. Vincent's Act, March 15, 1786, cl. 102. Upper Canada, 11 Geo. 4, c. 5. Nova Scotia Act, 28 Geo. 3, c. 5. New Brunswick Act, 26 Geo. 3, c. 18. Prince Edward's Island Act, 1 Wm. 4, c. 13.

CHAPTER VII.

EXTENSION OF TIME TO THE PRINCIPAL.

By the Civil Law and the systems founded on it, the extension did not discharge the surety if it merely related to the time of payment, and not to the time which formed part of the contract.—Opinions of Vinnius. —Pothier.—Code Civil.—Law of Scotland.—Law of England.—The extension of time must be that which would prevent the creditor from suing the principal.—Agreement for it must be founded on a sufficient consideration, and if on a condition, the condition must be performed.—Reasons for holding the surety discharged.—When the surety's rights against the debtor are not prejudiced.—When the surety assents to the arrangement, or subsequently approves.—But not if he is ignorant of the fact of being discharged by the time given.—Relief at law where the instrument shews that the party is surety.—Where the extension of time is by an instrument of the same quality as that of the contract.—Cases in which relief can only be obtained in equity.

If the creditor gave time to the principal, although without the knowledge or consent of the surety, it was not considered in the civil law, or by the commentators, that he had thereby discharged the latter. A distinction was made by some jurists between the case, when it was part of the obligation for which the surety engaged that the debtor should pay on a certain day, and the case where no day was fixed. Some jurists considered that, although in the latter case, the surety was not discharged, yet, that in the former, he was discharged. Two texts in the Codes are cited in support of this opinion. "Si, cum Hermes vectigal octavarum in quinquennium conduceret, fidem tuam obligasti; posteaque spatio ejus temporis expleto, cum idem Hermes in conductione, ut idoneus detineretur, non consensisti, sed cautionem tibi reddi postulasti: non

oportere te de posterioris temporis periculo adstringi, competens Judex non ignorabit" (*a*).

"Qui impleto tempore conductionis, remansit in conductione, non solum reconduxisse videbitur, sed etiam pignora videntur durare obligata. Sed hoc ita verum est, si non alius pro eo in priore conductione, res obligaverat: hujus enim novus consensus erit necessarius. Eadem causa erit, et si Reipublicæ prædia locata fuerint. Quod autem diximus, *taciturnitate utriusque partis colonum reconduxisse videri*, ita accipiendum est, ut in ipso anno, quo tacuerunt, videantur eandem locationem renovasse, non etiam in sequentibus annis; et si lustrum forte ab initio fuerat conductioni præstitutum. Sed et si secundo quoque anno post finitum lustrum nihil fuerit contrarium actum, eandem videri locationem in illo anno permansisse: hoc enim ipso quo tacuerunt, consensisse videntur, et hoc deinceps in unoquoque anno observandum est" (*b*).

Other jurists maintain, that in neither case is the surety discharged. Vinnius has discussed the question at considerable length. He conceives the texts referred to apply to the prorogation not of the time of payment, but of the obligation itself, and even in that case the surety will remain liable for the time included in his obligation, although not for the extended time. If a person become surety for another's conduct in a public office for the term of one year, and he was continued in the office for two years, the surety would remain liable for any default committed by the principal in the first, but not for that which he committed in the second year.

"Putaverunt prorogatione temporis ad solvendum constituti liberari fidejussorem sine ulla distinctione. Alii vero distinguunt, utrum fidejussor simpliciter sine adjectione temporis fidem suam interposuit an vero ad certum duntaxet

(*a*) Cod. lib. 4, tit. 64, l. 7.
(*b*) Digest. lib. 19, tit. 2, p. 350, l. 13.

tempus se obligavit: priore casu ne aut prorogatione solutionis effici, ut fidejussor liberetur: posteriore autem casu contendunt data prorogatione termini fidejussorem liberari. Et hæc est communis interpretum opinio cui etiam Fachinæus et Berlichius assentiuntur (*c*). Sed verius est neutro casu prorogatione solutionis liberari fidejussorem: nec ullus in jure nostro locus produci potest, quo contrarium prolectur, sive fidejussio tempore determinata sit, sive interminata. Abuntur autem interpretes locis quibusdam *veluti quippe* quibus locis non agitur de prorogatione solutionis, sed de obligationis pro qua fidejussor intervenerat finitæ renovatione; nec illud dicitur fidejussorem renovata obligatione liberari: sed renovatæ obligationis periculum ad eum non pertinere: cæterum ex priore contractu obligatus esse propterea non desinit, ut superiore capite plene demonstravimus. Igitur si debitori, qui ad certum diem se soluturum promiserat, eoque nomine fidejussorem dederat, creditor inscio fidejussore facultatem solvendi in longius tempus prorogavit, negamus idcirco fidejussorem liberatum videri: cum principalis obligatio salva maneat" (*d*).

He considers that the surety has a remedy by which he can protect himself against any injury from this extension of time. He may pay the creditor, and at once sue the debtor, or upon proof of the debtor's affairs being embarrassed, compel the creditor to proceed against him. "Si pro ea contra quam supplicas, fidejussor seu mandator intercessisti; et neque condemnatus es, neque bona (sua) eam dilapidare (postea) cœpisse comprobare possis, ut (tibi) justam metuendi causam præbeat; neque ab initio ita te obligationem suscepisse, ut eam possis et ante solutionem convenire; nulla juris ratione, antequam

(*c*) Vinnius Sel. Quæst. lib. 2, p. 142. Gomez. lib. 2, var. resolut. c. 13, n. 21. Fachin, lib. 2, contr. 88. Hering. de Fidejuss. c. 20, § 12, n. 2 and 3. Berlich. d. p. 2, concl. 25, n. 18.

(*d*) Duarenus Sel. Quæst. c. 42. Hering. de Fidejuss. c. 20, s. 12.

satis creditori pro ea feceris, eam ad solutionem urgeri certum est. Fidejussorem vero seu mandatorem exceptione munitum, et injuria Judicis damnatum, et appellatione contra bonam fidem minime usum, non posse (*e*) mandati agere, manifestum est" (*f*).

Pothier states a case, in which he seems to consider that the surety would be discharged, but generally he concurs in the opinion of Vinnius. "When the creditor has voluntarily received from the debtor an estate in payment of a sum of money which is due to him, the surety is discharged, although the creditor is afterwards evicted from the estate; the reason for doubting is, that the payment in this case is not valid, not having transferred to the person to whom it was made, the property of the thing (*g*), that consequently, the principal obligation subsists, and, it seems to follow, that the obligation of the surety should likewise subsist. Basset IV. 22, 5, adduces an arrêt, by which it was so decided. Notwithstanding these reasons, and though it cannot be denied, that in this case the payment is not valid, and that the principal obligation subsists, it was decided by some arrêts, adduced by Basnage (*h*), that the creditor could not in this case proceed against the surety, if the principal debtor had in the mean time become insolvent. The decision of these arrêts is founded upon this principle of equity, that *nemo ex alterius facto prægravari debet;* the surety ought not to suffer prejudice from the arrangement between the creditor and principal debtor; now, if in this case, the creditor could proceed against the surety, he would suffer prejudice from the arrangement, by which the creditor has taken this estate in payment; the creditor having deprived

(*e*) Cod. lib. 4, tit. 35, l. 10.
(*f*) Digest. lib. 17, tit. 1, l. 38. Vinnius Sel. Quæst. lib. 2, p. 142.
(*g*) Pothier Tr. des Oblig. Part 111, c. 1, Art. 111, and 3.
(*h*) Trait. des Hyth. p. 3, c. fin.

the surety of the power which he had, by paying the creditor whilst the debtor was solvent, and of demanding from the debtor a restitution of the sum for which he had undertaken.

If the creditor had merely allowed the debtor a prolongation of the term of payment, and during this term the debtor had became insolvent, the surety would not be exempted from paying (*i*), according to the opinion of Vinnius (*j*).

But Pothier proceeds to observe that this case is very different from the preceding. In the preceding case, the giving of the estate in payment had made it appear, until the time of the eviction, as if the debt had actually been acquitted; such an arrangement has deprived the surety of every means to provide for his indemnity, even if he perceived that the affairs of the debtor, for whom he became surety, were falling into derangement: for he could not demand that the debtor should discharge him from his engagement which, as well as the principal debt, appeared to be acquitted. But by the mere prolongation of term allowed by the creditor to the debtor, the debt does not appear to be acquitted, nor is the surety thereby deprived of the means of providing for his indemnity, and of proceeding against the principal debtor, if he perceives that his affairs are beginning to be deranged, si bona dilapidare cæperit (*k*). He cannot then pretend that this prolongation of the term does him any injury, since, on the contrary, he himself derives advantage from it.

According to the present law of France, "La simple prorogation de terme, accordée par le créancier au débiteur principal, ne décharge point la caution, qui peut, en ce cas, poursuivre le débiteur pour le forcer au paiement" (*l*).

It will be observed, that this doctrine proceeds on the

(*i*) Vinnius Q. Sel. II. Sel. 42.
(*j*) Pothier, ib.
(*k*) Vinn. ib.
(*l*) Code Civil, Art. 2039.

ground that the time is mentioned in the contract only in relation to the payment, and not for the purpose of limiting or ending the obligation. Vinnius expressly says, that if it had been inserted for the latter purpose, the surety would not remain liable for any period beyond that so inserted.

Non enim tempus in obligatione fidejussoris, appositum est ad finiendam aut limitandum obligationem, quo casu aliud dicendum esset, respectu periculi sequentis temporis sed ad faciendam solutionem et exactionem (*m*).

The doctrine of the law of Scotland is thus stated: the cautioners are bound to look to the condition of the debtor for whom they interpose; and even without paying up the debt, which is always in their power, the law provides them with remedies, by inhibition, adjudication, or arrestment in security, to protect themselves against the insolvency of the debtor. Unless, therefore, there is something in the peculiar nature of the debt, implying a particular course of diligence, as in the case of bills; or something confidential in the nature of the transaction, as in the case of cautionary obligations for the fidelity of a bank agent; or something of fraud, or collusion, or gross negligence approaching to dole; the creditor is not held chargeable to such a degree with the protection of the cautioners as to be under any special necessity of doing diligence; though he cannot discharge his diligence when completed, without freeing the cautioners (*n*).

It will not then be a sufficient answer to his claim on the cautioner, that, by a due diligence, he might have recovered from the principal.

If, however, there is a particular privilege annexed to the debt, by which the creditor may have a preference over the debtor's funds, it would seem that it can be no more

(*m*) Vinn. lib. 2, Sel. Quæst. p. 42. Hering. c. 20, s. 12.
(*n*) Ersk. b. 3, tit. 3, § 66.

neglected with safety to the claim of recourse against cautioners, than a security which ought to have been available to the cautioners may be renounced or neglected. In loans, for example, by means of Exchequer bills, under particular statutes, or on bonds to the Excise or Customs, the person binding as co-obligant, or surety, has it in his power, on paying up the debt, to secure a preference by writ of extent. If he neglect this till it be too late, and then come against other persons bound to him as cautioners or guarantees, they would seem to be entitled to defend themselves on the ground of virtual discharge (*o*).

It is not required that the creditor shall, in an ordinary money bond, or in a bargain on a certain term of credit, instantly enforce payment of the debt on the expiration of the term. But where the creditor has, by positive contract, given time, the case is different from that of mere inactivity; it being by such contract put out of the power of the surety to have recourse against the principal in the same way in which he might otherwise have proceeded.

It is a question of some difficulty, what shall be the effect of the creditor's neglect to take proper means of completing the security stipulated. An heritable bond, for example, if good, will be available to the cautioners, but may be rendered ineffectual by an error in completing the sasine on the titles. It seems to require a very special stipulation to prevent such a neglect from discharging the cautioners (*p*).

By the law of England, the creditor who, without the consent of the surety, gives time to the principal (*q*), or enters

(*o*) Morrison *v.* Balfour, 25th June, 1822, 1 Shaw & Ballantine, 525.

(*p*) Flemming *v.* Wilson, 24th May, 1823, 2 Shaw & Dunlop. 336. Fraser *v.* M'Turk, 25th June, 1822, 1 Shaw & Ballantine, 524; 2 Bell's Comm. p. 360-1.

(*q*) Samuell *v.* Howarth, 3 Meriv. 272. Nisbet *v.* Smith, 2 Bro. C. C. 579. Clarke *v.* Harty, 3 You. & Coll. 187. Rees *v.* Berrington, 2 Ves.

into any contract with the principal, which in its consequences may have the effect of giving time to him (*r*), releases the surety from his engagement; that is, if time is given as an extension of the original contract (*s*), by virtue of a subsequent valid contract between the creditor and the principal (*t*), by which the creditor has, by some valid and effectual engagement, deprived himself of the power of suing the principal.

But the surety will not be discharged by mere forbearance, unless there be some stipulation in the contract that the creditor is to use due diligence against the principal (*u*).

But in all these cases, time so given must be by a contract which is binding. It must therefore be made for a *sufficient consideration*, as a contract without consideration is void (*v*). Thus where the principal applied to the creditor for indulgence for some months, and the creditor informed him he would give him the time he required; as no fresh security was taken from the principal, the agreement of the creditor to wait was without consideration and gratuitous, and as under such a contract, the creditor was not precluded from proceeding against the principal, the surety was held not discharged (*w*).

jun. 540. Oakeley *v.* Pasheller, 10 Bli. N. S. 548. Bowsfield *v.* Turner, 4 Taunt. 456. English *v.* Darley, 2 Bos. & P. 61. S. C. 3 Esp. 49. Skip *v.* Huey, 9 Mod. 438. S. C. 3 Atk. 91, and see Eyre & Bartrop, 3 Madd. 221, and the observations of Lord Eldon, C., in Hawkshaw *v.* Parkins, 2 Swanst. 539.

(*r*) Bowmaker *v.* Moore, 7 Price, 223.

(*s*) Combe *v.* Wolff, 8 Bing. 156. Rees *v.* Berrington, 2 Ves. jun. 540. Nisbet *v.* Smith, *supra*. Skip *v.* Huey, *supra*.

(*t*) Samuell *v.* Howarth, *supra*.

(*u*) Goring *v.* Edmonds, 6 Bingh. 94. Orme *v.* Young, Holt. N. P. C. 84. Musket *v.* Rogers, 5 Bing. N. C. 728. Holl *v.* Hadley, 2 Ad. & Ell. 528.

(*v*) Philpot *v.* Briant, 4 Bing. 717. The Arundel Bank *v.* Goble, Chit. on Bills, 296, approved in Philpot *v.* Briant. Brickwood *v.* Annis, 5 Taunt. 614. S. C. 1 Marsh. 250. Clark *v.* Wilson, 3 Mees. & W. 208. Badnall *v.* Samuel, 3 Price, 521.

(*w*) The Arundel Bank *v.* Goble, Chit. on Bills, 296. Philpot *v.* Briant, 4 Bing. 707. S. C. 1 Moo. & P. 754.

So, where a creditor told his principal debtor that he would accept a composition, if his other creditors would concur in it, and he would give him three weeks' time to consult them, during which time, the creditors promised not to take any proceedings, it was held that the agreement was without consideration, and not binding on the creditors, and therefore that the surety was not discharged (*x*).

So if the agreement to give time is conditional, depending upon the performance of some act by the principal debtor, which the latter neglects to perform, the agreement thereby becomes inoperative, and the parties are left in the same situation as that in which they were at the time when they entered into it (*y*). The surety, where time has been given, is held to be discharged for these reasons; that it is his right, upon payment of the debt, to demand in a Court of Equity to sue in the name of the creditor, and if the creditor has given time to the principal, he has put it out of the power of the surety to use the creditor's name with effect, and avail himself of his right to enforce immediate payment from the principal (*z*). By postponement, the remedy of the surety against the principal may become more uncertain (*a*). And the surety will be held discharged, although it be proved that time was given in consequence of the principal's inability to pay (*b*), or

(*x*) Brickwood *v.* Annis, 5 Taunt. 614. S. C. 1 Marsh. 250.

(*y*) Vernon *v.* Turley, 1 Mees. & W. 316. Badnall *v.* Samuel, 3 Price, 521.

(*z*) Samuel *v.* Howarth, 3 Meriv. 272. Melville *v.* Glendinning, 7 Taunt. 126, and see the observations of Lord Eldon, C., in The Bank of Ireland *v.* Beresford, 6 Dow. 233; of Gibbs, C. J., in Orme *v.* Young, Holt, N. P. C. 84, and of Sir John Leach, M. R., in Oakeley *v.* Pasheller, 10 Bli. N. S. 576, in n.

(*a*) See the judgment of Tindal, C. J., in Browne *v.* Carr, 7 Bing. 508, Combe *v.* Wolf, 8 Bing. 156, and the observations of Sir J. Leach, M. R., in Oakeley *v.* Pasheller, *supra*.

(*b*) Samuel *v.* Howarth, 3 Meriv. 272.

that no injury had accrued (*c*), or even that it was manifestly for the surety's advantage (*d*). The surety himself is the proper judge of, and he alone has the right to determine, what is, or is not, for his benefit; thus, if one be surety by bond for the debt of another payable at a given day, and the obligee take promissory notes payable at a subsequent period, or a bond conditioned for paying the same debt by instalments he thereby discharges the surety (*e*).

Where a creditor, whose debt is secured by bond, takes a less rate of interest by anticipation than the rate of interest payable on the bond, the anticipation of such interest in advance amounts to giving time, and will discharge the surety; since equity would restrain any action by the obligee on the bond, to recover the principal money, until the time had expired for which the obligee had received the interest on the principal money (*f*).

The surety is discharged, when the creditor takes out execution against the principal and waives it (*g*): or where having taken out execution he receives from the principal a sum of money in part payment, and takes his security for the remainder with the exception of a nominal sum only (*h*). The creditor

(*c*) See Whitaker *v.* Hall, 8 Dowl. & Ry. 22, and the observations of Richards, C. B., in Bowmaker *v.* Moore, 7 Price, 223.

(*d*) See Boultbee *v.* Stubbs, 18 Ves. 20. Ex parte Glendinning, Buck. 517. Samuel *v.* Howarth, *supra*. Ex parte Wilson, 11 Ves. 410, and the observations of Sir Anthony Hart, L. C., in Lord Haberton *v.* Bennett, 1 Beat. 386; of Lord Langdale, M. R., in Calvert *v.* The London Dock Company, 2 Keen, 638, and of Lord Eldon, C., ex parte Gifford, 6 Ves. 805.

(*e*) Rees *v.* Berrington, 2 Ves. jun. 540. Nisbet *v.* Smith, 2 Bro. C. C. 579. Skip *v.* Huey, 3 Atk. 91. S. C. 9 Mod. 438.

(*f*) Blake *v.* White, 1 You. & Coll. 420.

(*g*) Mayhew *v.* Crickett, 2 Swanst. 185. S. C. 1 Wils. C. C. 418; and see the judgment of Lord Eldon, C. J., in Smith *v.* Knox, 3 Esp. 47, and Williams *v.* Price, 1 Sim. & Stu. 581.

(*h*) English *v.* Darley, 2 Bos. & P. 61. S. C. 3 Esp. 49.

is considered a trustee of his execution for all parties interested in the subject-matter, concerning which such execution has been taken out. But where a *fieri facias* had been sued out against the acceptor of a bill of exchange, and which was afterwards waived, it was held, that the drawer was not thereby discharged; for the rule that an indulgence to an acceptor without the consent of the drawer discharges such drawer, does not apply after judgment (*i*).

Any indulgence to the principal which is obligatory, without the consent of the bail, and which operates to their prejudice, discharges the bail (*j*); thus if the creditor, having recovered a judgment against the principal, take from him a bill of exchange to which a surety is a party for payment of the debt, and costs by instalments, the bail are discharged, for the bail cannot render the principal if the creditor give the principal time for payment by instalments, until the time when there is a failure in the payment of an instalment, and the bail are therefore put in a different situation from that in which they had placed themselves, when they entered into their recognizance (*k*).

Sureties in a replevin bond are released from their liability, when, without their privity, the defendant in replevin gives time to the plaintiff therein (*l*), for the condition is an undertaking on the part of the sureties that the tenant shall prosecute his suit with effect, and without delay, and make return of the goods seized, if so adjudged, but the tenant by such

(*i*) Pole *v.* Ford, 2 Chit. 125.

(*j*) Thomas *v.* Young, 15 East, 617. West *v.* Ashdowne, 1 Bing. 164. S. C. 7 J. B. Moo. 566. Farmer *v.* Thorley, 4 B. & Ald. 91. Bowsfield *v.* Tower, 4 Taunt. 456. Croft *v.* Johnson, 5 Taunt. 319. S. C. 1 Marsh. 59, and see Melvill *v.* Glendinning, 7 Taunt. 126. Rex *v.* The Sheriff of Surrey, 1 Taunt. 126.

(*k*) Willis *v.* Whitaker, 7 Taunt. 53. S. C. 2 Marsh. 383.

(*l*) Bowmaker *v.* Moore, 3 Price, 214. S. C. 7 Price, 223, and see Archer *v.* Hale, 4 Bing. 464. S. C. 1 Moo. & P. 285, and the observations of Tindal, C. J., in Aldridge *v.* Harper, 10 Bing. 118.

agreement is precluded from enforcing the condition of the bond, and is restrained by the act of the landlord, from doing that which his sureties have engaged he shall do.

But if by the agreement entered into between the creditor and the principal, the remedies of the surety are not diminished or affected (*m*), and still less if they are accelerated (*n*), as the surety can sustain no prejudice, he remains still liable as surety. Thus, where it was the condition of the bond given by the sureties, that they should, within one month after demand on them, pay such balance as should become due to the creditors, upon settlement of accounts between them and the principals, and a balance having become due to the creditors, the latter, without communicating to the sureties, took from the principals a warrant of attorney for the amount, with a stay of execution if they should discharge the debt by instalments of a certain sum per month, and that in default execution might issue for the whole debt; and the first instalment not having been paid, the creditors made a demand on the sureties according to the terms of the bond, it was held by Sir John Leach, V. C., that as the liability of the sureties did not arise till demand, and as before demand default had been actually made by the principal debtors, so that execution might be instantly issued for the whole debt, the agreement made by the warrant of attorney was inoperative, and the sureties were in no respect injured, for there was nothing to interfere with or prevent their having immediate recourse to the principal debtors (*o*).

So if a creditor accept from the principal a cognovit in an action he had brought against the principal, with a stay of

(*m*) Prendergast *v.* Devey, 6 Madd. 124.

(*n*) Hulme *v.* Coles, 2 Sim. 12. Stevenson *v.* Roche, 9 B. & C. 707. Jay *v.* Warren, 1 Car. & P. 532.

(*o*) Prendergast *v.* Devey, 6 Madd. 124. Price *v.* Edwards, 10 B. & Cress. 578.

execution until a day earlier than that on which judgment could have been obtained in the regular course (*p*): or for paying the debt by instalments if judgment could not have been had, and execution issued, by the time fixed for payment of the last instalment (*q*): or if, during the progress of the cause, the creditor agree to give the principal a month's time to pay the debt, and the time so given would expire before judgment could, by the practice of the Court, be obtained (*r*), the surety will not be discharged.

A surety cannot claim relief in respect of an arrangement made between the creditor and the principal to which the surety has himself assented (*s*), or which, although made without his previous knowledge, has been afterwards approved and confirmed by him (*t*); but if the approbation were given by the surety in ignorance of the *fact* that he had been discharged in consequence of time having been given to the principal, the surety will continue discharged (*u*).

The surety will not be discharged if the creditor had been induced to make the arrangement under a false representation made to him by the surety, that the creditor's rights against

(*p*) Hulme *v.* Coles, 2 Sim. 12. Stevenson *v.* Roche, 9 B. & C. 707. Stevenson *v.* Crease, 4 Man. & Ry. 561; and see Jay *v.* Warren, 1 Car. & P. 532.

(*q*) Stevenson *v.* Roche, 9 B. & C. 707.

(*r*) Whitfield *v.* Hodges, 1 Mees. & W. 679.

(*s*) Clerk *v.* Delvin, 3 Bos. & P. 363. Tyson *v.* Cox, T. & Russ. 395. Cowper *v.* Smith, 4 Mees. & W. 519. Winkworth *v.* Mills, 2 Esp. 484. Duffy *v.* Orr, 5 Bli. N. S. 620; and see Cox *v.* Nash, 9 Bing. 723. Cooling *v.* Noyes, 6 T. R. 263. Ex parte Powell, 2 Mont. & Ay. 533. S. C. 1 Deac. 378. Lancaster *v.* Harrison, 6 Bing. 716. Cleft *v.* Gye, 9 B. & C. 422. Charleton *v.* Morris, 6 Bing. 417.

(*t*) Tyson *v.* Cox, *supra*. Smith *v.* Winter, 4 Mees. & W. 454; and see Duffy *v.* Orr, *supra*. Mayhew *v.* Cricket, 2 Swanst. 185. S. C. 1 Wils. C. C. 418.

(*u*) West *v.* Ashdown, 1 Bing. 164.

himself would not be injured (*v*): nor where the principal stated to the surety that the creditor had applied to him for payment, and the surety told him to see the creditor's solicitors and do the best he could with them, and the principal afterwards arranged with the solicitors accordingly, and the arrangements were communicated to the surety, who expressed himself perfectly satisfied with them (*w*): nor where the holder of a bill of exchange told the drawer of his intention to take a warrant of attorney from the acceptor, to which the drawer replied, "You may do as you like, for I have had no notice of the non-payment," (but which circumstance was not true); for the reply of the drawer was held to amount to an assent on his part, that the holder should take a warrant of attorney from the acceptor (*x*).

The holder of a bill of exchange had, at its maturity, allowed the acceptor to renew it without consulting the indorser, from whom the holder received it, and the indorser afterwards was told by the acceptor, that he had taken up his acceptance by another bill, which the indorser approved, and said, "It was the best thing that could be done;" such approval was held to refer to the acceptor of the bill, to whom it was evidently advantageous, and was not deemed a recognition of the act of the holder; and the indorser was held discharged (*y*).

But a creditor may stipulate with the principal for his right to go against the surety, and the liability of the latter will remain, notwithstanding the arrangement between the principal and creditor to give the former time (*z*); for the effect of the

(*v*) See the observations of Tindal, C. J., in Cox *v.* Nash, 9 Bing. 723; and see Cooling *v.* Noyes, 6 T. R. 263.

(*w*) Tyson *v.* Cox, T. & Russ. 395.

(*x*) Clark *v.* Devlin, 3 Bos. & P. 363.

(*y*) Wittall *v.* Masterman, 2 Camp. 179.

(*z*) Ex parte Glendinning, Buck. 517. Smith *v.* Winter, 4 Mees. &

agreement is, to save the right of the creditor to proceed against the surety, who, upon paying, could immediately recover against the principal; and the principal, as against the surety, could not insist upon the forbearance given to him by the creditor, because it is part of the contract between the creditor and the principal, that the creditor's rights are reserved against the surety (*a*). If, however, time be given by deed to the principal, the reservation of the creditor's rights, to proceed against the surety, should be upon the face of the instrument itself, for no evidence can be admitted to explain or vary the effect of the instrument (*b*): and such reservation should be clearly and unequivocally expressed, and free from any doubt (*c*).

A Court of law, as well as equity, gives the same effect to the extension of time by the creditor to the principal, and holds the surety discharged (*cc*).

But though the same relief may be obtained in a Court of law as well as in a Court of equity, a Court of equity will not send a party, who is suing there, to a Court of law for the discharge, to which he is equally entitled in equity (*d*).

To enable the surety to avail himself of this defence *at law*, the instrument must, on the face of it, shew that he is

W. 454; and see Hall *v.* Hutchons, 3 Myl. & K. 426, and Lord Eldon's observations in Boultbee *v.* Stubbs, 18 Ves. 20; and Duffy *v.* Orr, 5 Bli. N. S. 620; Ex parte Gifford, 6 Ves. 805; Ex parte Carstairs, Buck. 560.

(*a*) Boultbee *v.* Stubbs, 18 Ves. 20.

(*b*) Ex parte Glendinning, Buck. 517.

(*c*) Boultbee *v.* Stubbs, 18 Ves. 20.

(*cc*) Moore *v.* Bowmaker, 6 Taunt. 379. S. C. 2 Marsh. 81. Samuell *v.* Howarth, *supra*, and see the judgment of Best, C. J., in Philpot *v.* Briant, 4 Bing. 717.

(*d*) Samuell *v.* Howarth, 3 Meriv. 272. Mayhew *v.* Crickett, 2 Swanst. 185. S. C. 1 Wils. C. C. 418, and see the observations of Lord Eldon, C., in Hawkshaw *v.* Parkins, 2 Swanst. 539.

such surety: if he is bound as principal, he cannot, *at law*, aver by pleading that he is bound as surety (*e*), though, *in equity*, parol evidence is admissible to shew who is principal and who surety (*f*). Thus, if two persons are jointly (*g*), or jointly and severally bound to the creditor, the one as principal, and the other as surety, and both appear upon the instrument as principals, such surety obligor, when time has been given to the principal debtor, or to the representatives of such principal debtor, cannot obtain relief at law, although he can obtain it in a Court of equity (*h*).

The agreement also, by which it is attempted to be shewn that time has been given to the principal, must, *at law*, be as binding as the instrument creating the surety's liability, or it will not avail (*i*); and though equity will interfere and grant relief *j*, it is no defence *at law*, to an action against a surety on a bond, or other instrument under seal (*k*), or where the

(*e*) Per Lord Loughborough, C., in Rees *v.* Berrington, 2 Ves. jun. 540; and see Lewis *v.* Jones, 4 B. & C. 506; and see the judgment of Abbott, C. J., in Davey *v.* Prendergast, 5 B. & Ald. 187, and the observations of Bayley, J., in Pease *v.* Hirst, 10 B. & C. 122, and of Lord Abinger, C. B., in Ashbee *v.* Pidduck, 1 Mees. & W. 564.

(*f*) Graythorne *v* Swinburne, 14 Ves. 160. Clarke *v.* Henty, 3 You. & Coll. 187; and see Lord Thurlow's judgment in Clinton *v.* Hooper, 1 Ves. jun. 173. S. C. 3 Bro. C. C. 201.

(*g*) Ashbee *v.* Pidduck, 1 Mees. & W. 564.

(*h*) Rees *v.* Berrington, 2 Ves. jun. 540.

(*i*) Davey *v.* Prendergast, 5 B. & Ald. 187, and see Field *v.* Robins, 8 Ad. & Ell. 90.

(*j*) Blake *v.* White, 1 You. & Coll. 420. Bowmaker *v.* Moore, 3 Price, 214. S. C. 7 Price, 723, and see Heath *v.* Key, 1 You. & J. 434. Combe *v.* Woolf, 8 Bing. 156.

(*k*) Davey *v.* Prendergast, 5 B. & Ald. 187. Rees *v.* Berrington, 2 Ves. jun. 540. Bulteel *v.* Jarrold, 8 Price, 467. Donnelly *v.* Dunn, 2 Bos. & P. 45. Moore *v.* Bowmaker, 6 Taunt. 399. S. C. 2 Marsh. 81. Aldridge *v.* Harper, 10 Bing. 118, and see Littler *v.* Holland, 3 T. R. 590. Hayford *v.* Andrews, Cro. Eliz. 697. Field *v.* Robins,

cause of action arises upon matter of record, as a recognizance (*l*), that by parol agreement time has been given to the principal.

supra. Cocks *v.* Nash, 9 Bing. 341. Hallett *v.* Mount Stephen, 2 Dowl. & Ry. 343. Woosnam *v.* Price, 1 Cr. & Mees. 352. Ashbee *v.* Pidduck, 1 Mees. & W. 564.

(*l*) Bulteel *v.* Jarrold, 8 Price, 467.

CHAPTER VIII.

ALTERATION OF THE CONTRACT.

Alteration of the contract, in whatever respects its nature or quality.—Of time.—Of the subject of the contract.—Of the term of letting.

An alteration in the obligation or contract, in respect of which a person becomes surety, extinguishes the obligation and discharges him, unless he has become by a subsequent stipulation a surety for, or consents to the contract so altered. "Finiri dicitur obligatio fidejussoria ob alterationem obligationis sive contractus, pro quo fidejussor fidem suam interposuit (*a*) fidejussorem non teneri ex novo contractu, nisi denuò intercedat per interpositam stipulationem" (*b*).

Any subsequent addition to, or deviation, or abstraction from the contract, is such an alteration as discharges the surety. Thus, if the buyer and seller agree after the contract of sale to increase or reduce the price originally agreed on, they recede from the original contract, a new contract is substituted, and the surety, whose obligation was in respect of the original contract, is no longer bound. "Mutato enim pretio ex quo consistit substantia status et natura emptionis et emptio mutatur" (*c*). If the buyer and seller alter the subject-matter of the sale, as, if the goods originally delivered are returned, and others are purchased for the same or a greater price than that for which the original goods had been sold, the surety is discharged. "Alterantur autem revera

(*a*) Bald. in l. tam Mandatori. C. de non numer. per Barth Soc. in Consi. 62, num. 23, vol. 2. Hering. de Fidejus. c. 20, p. 285.

(*b*) Joan. G. Gœddus de Contrah. Stipulat. c. 12, conclus. 10, num. 85.

(*c*) Ad Statut. Mediolanens, par. 2, c. 189, num. 12. Hering. cap. 20, p. 285.

initi contractus, quando posteà, vel in continenti, vel ex intervallo, per certa pacta illis quidquam vel adjicitur, vel detrahitur (*d*). Quod si igitur venditor, et emptor post emptionem paciscantur, de minuendo, vel augendo pretio, recessum est à priore contractu, et nova emptio intercessisse videtur, ideoque fidejussor, qui pro priore contractu intercesserat, amplius non tenetur. Idem est, si posteà venditor, et emptor merces alterent, et recepta merce priùs vendita alia pro eodem, vel majore prètio ematur, ut enim pretium, ita et merx de substantia est emptionis, et venditionis" (*e*).

The surety's liability, when the contract is for letting and hiring *locatio et conductio*, will also be discharged, if any increase or diminution of the rent is subsequently agreed on, or any change of the subject hired. "Alterato contractu per locatorem, licitum esse fidejussoribus ab illo recedere, eoque minimè obligatos esse" (*f*).

The right of the surety to resist any claim which the creditor may make against him, founded on the contract, and to insist on his discharge, may be repelled on the same ground as that on which the performance of any other contract may be resisted, namely, that it is not the contract into which he had entered.

If there be any variation in the contract, made without the surety's consent, and which is in effect a substitution of a new agreement, although the original agreement may, notwithstanding such variation, be *substantially* performed, the surety is discharged (*g*).

The condition of a bond recited that A. the obligor was a banker, and that B., a paper manufacturer, kept an account

(*d*) Cujac. lib. 14, Obser. c. 28, and lib. 2, cap. 15.
(*e*) Hering. cap. 20, p. 285, *et seq.*
(*f*) Ibid.
(*g*) Evans *v.* Whyle, 5 Bing. 485. S. C. Mood. & M. 468. Eyre *v.* Bartrop, 3 Madd. 221. Archer *v.* Hale, 4 Bing. 464.

with A. which had been overdrawn to the amount of 4,000*l.*, and that, in order to enable B. to carry on his business, he had applied to A. to allow him for a time to overdraw such further sums as he should require, so as that the same, together with the 4,000*l.*, should not exceed in the whole at any one time 5,000*l.*, and A. had agreed to do this. It then expressed to be for the payment by B., and C. as his surety, or one of them, of the sum of 4,000*l.*, and also such further sums as A. should or might thereafter advance to B. in the course of business, not exceeding in the whole 5,000*l.*: it was held not to be avoided by C. having allowed B. to overdraw to an amount which, together with the 4,000*l.*, exceeded 5,000*l.*; for the condition did not restrict A. from making B. advances beyond the 5,000*l.*, but simply limited the liability of C. to the 5,000*l.*, however large the advances might be (*h*).

An annuity had been granted, with liberty for the grantor or his surety to redeem it, upon the payment of a certain sum, after giving the grantee notice of such intention. The grantor and grantee, unknown to the surety, subsequently entered into new arrangements, by one of which it was agreed that the grantor should not, until the expiration of five years from the date of such new arrangement, or until the death of the grantor's father, (which should first happen), demand or sue for the said annuity or any part thereof, and by another of the said arrangements made at the expiration of the five years, (the grantor's father being then alive, and the annuity unredeemed, and the arrears unpaid), the grantor consented to receive the arrears of the annuity by instalments, the payment of them to be secured by a judgment acknowledged by the grantor. It was held, that by these arrangements, and the change in the terms of redemption, the surety was

(*h*) Parker *v.* Wise, 6 M. & Sel. 239, and see Ex parte Rushforth, 10 Ves. 409. Paley *v.* Field, 12 Ves. 435.

wholly discharged, as well in respect to all claims of the past, as of the future arrears of the annuity (*i*).

Where A. became surety for B. to C. for a sum to be advanced by the latter, "by a draft at three month's date," and, instead of a draft being given, C. advanced, without the concurrence of A., the money at once; it was held, that by such variation from the agreement the surety was discharged (*j*).

A person joining with the principal in a joint and several promissory note to a banking company, which was to be a security for the floating balance which might be owing to the company, is released if they credit the principal with the full amount of the note (*k*).

J. H., being indebted on simple contract to W., prevailed on his father to execute a bond for the payment within four years, within which period the latter died, and W. obtained from the son and representative of the father a fresh bond for payment by yearly instalments; upon a creditor's suit for administering the father's estate, W. having claimed to come in upon the original bond, which he had retained; it was held that the second bond was to be presumed a satisfaction of the first, and that the father was to be considered only as a surety for the son, and that, by giving time to the principal debtor, the creditor had discharged the surety (*l*).

In an action against a surety on a contract for works, to be paid for as the work proceeded, but the contractor became bankrupt, and received advances beyond what he was entitled to under the contract, and for which extra advances security had been taken; it was held, that in respect of the latter, the surety was not liable for the loss sustained by the non-fulfilment of the works (*m*).

(*i*) Eyre *v.* Bartrop, 3 Madd. 221.
(*j*) Bonsor *v.* Cox, 6 Beav. 110.
(*k*) Archer *v.* Hudson, 7 Beav. Rep. 551.
(*l*) Clarke *v.* Henty, 3 You. & C. 187.
(*m*) Ware *v.* Calvert, 3 Nev. & P. 139.

CHAPTER IX.

FRAUD.

If the obligation has been contracted through the fraud of the creditor or of the debtor, with the creditor's privity.—Doctrine of the civil law, and of other codes.—Consists in the representation of what is false, or the suppression of what is true.—Instances.—If it affects only the obligation of the surety, and not the original debt of the principal, the surety only, and not the co-surety nor the principal, is discharged.

FRAUD by the creditor, in relation to the obligation of the surety, or by the debtor, with the knowledge or assent of the creditor, will discharge the surety from his liability. If the original obligation by the debtor can be avoided by fraud, the surety will also be discharged (*a*).

Fraud is described in the civil law to be "omnis calliditas, fallacia, machinatio ad circumveniendum, fallendum, decipiendum alterum adhibita" (*b*).

The edict is directed against "quæ *dolo malo* facta esse judicantur."

The term "malus" was retained to distinguish it from that artifice or address, the *solertia*, or *calliditas*, which was justifiable towards the enemy of one's country, or a public robber, and from that astuteness and address which might be practised consistently with the principle of the law, that "in emendo et vendendo naturaliter concessum est, quod pluris sit, minoris emere; quod minoris sit, pluris vendere, et ita invicem se circumscribere" (*c*).

(*a*) Hering. de Fidejus. c. 19, n. 15, *et seq.*
(*b*) Dig. lib. 4, tit. 3, l. 1, § 2.
(*c*) Pothier, Tr. des. Oblig. n. 31. Toullier, liv. 3, c. 2.

If a party had no intention to enter, and would not have entered into the contract, if the fraud had not been practised, the commentators consider that in this case the fraud *causam contractui dat.* The Code Civil thus treats it:

"Le dol est une cause de nullité de la convention, lorsque les manœuvres pratiquées par l'une des parties sont telles, qu'il est évident que, sans ces manœuvres, l'autre partie n'aurait pas contracté" (*d*).

The definition adopted by the civil law is considered by the commentators sufficiently comprehensive to embrace the infinite variety of cases which will arise for its application (*e*).

Mascardus gives the following definition of it: "Quando quis cum alio contrahens tacet aliqua, quæ si expressisset, alias verisimiliter contractum non fecisset; nam hoc casu præsumiter dolus contra talia tacentem, et alii contrahenti subveniri debet in odium tacentis" (*f*).

This definition has been adopted by a late eminent Judge (*g*): "The principle to be drawn from the cases we take to be this, that if, *with the knowledge or assent of the creditor any material part* of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is voidable at law on the ground of fraud.

It is impossible to establish any invariable rule. Fraud is infinite; and were a Court to lay down rules how far they

(*d*) Code Civil, Art. 1116.

(*e*) Noodt, de Formâ Emen. Doli. U. Huber, Obs. Jur. Rom. lib. 3, c. 25. Coccius, de Dolo Malo. Brunneman, ad Pand. lib. 18, tit. 1, and ad Cod. Zoes. ad hunc tit. Mier. Coll. ad Pand. lib. 4, tit. 3, de Dolo Malo.

(*f*) Mascard. de Probation. vol. 2, p. 75.

(*g*) Per Tindal, C. J., Stone *v.* Compton, 5 Bing. N. C. 142.

would go in extending relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive (*g*).

Crescit in orbe dolus; cases cannot always be found to serve as direct authority for subsequent cases; but if a case arises of fraud, or presumption of fraud, to which even no principle already established can be applied, a new principle must be established to meet the fraud, as the principles on which former cases have been decided have been from time to time established as fraud contrived new devices, for the possibility will always exist that human ingenuity, in contriving fraud, will go beyond any cases which have before occurred (*h*).

The preceding definition comprehends the fraud, which consists in the representation of that which is false, and that which consists in the suppression of what is true (*i*), and examples are adduced by which each species of fraud is illustrated.

Thus, where the vendor gives a false description of the estate, the purchaser may at law rescind the contract. As where before the Reform Act, an estate was stated to be but one mile from a borough town, and it turned out to be between three and four, the contract was held to be voidable by the purchaser. And the same rule must prevail in equity where the misdescription, as in this case, is not, from the nature of it, a subject of compensation (*k*).

(*g*) See Lord Hardwicke's Letter to Lord Kaimes, 1 vol, Life of Lord Kaimes, 237. Lawley *v.* Hooper, 3 Atk. 278, and in Gifford *v.* Vaux, Dom. Proc. Feb. 27, 1739.

(*h*) Webb *v.* Rorke, 2 Scho. & Lef. 666.

(*i*) U. Huber, Obs. Jur. Rom. lib. 3, c. 25. Mier. Coll. ad Pand. lib. 4, tit. 3. Brunneman, ad Pand. de Dolo Malo. 3 Bos. & Pull. 371.

(*k*) Duke of Norfolk *v.* Worthy, 1 Campb. N. P. Rep. 337; and see Fenton *v.* Browne, 14 Ves. 144. ——— *v.* Christie, 1 Salk. 28, note. Trower *v.* Newcome, 3 Mer. 704.

So, in a case where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor, the purchaser was allowed to rescind the contract (*l*).

In certain cases where the misrepresentation or concealment is of such a nature that justice can be done by giving the purchaser compensation, a Court of equity interposes and gives that relief (*m*).

Where the purchaser of a leasehold house was aware of the ruinous state of the premises, but no mention was made at the sale by auction of a notice to repair given to the vendor by the lessor on the day before the sale, under which the lessor re-entered and evicted the purchaser, he (the purchaser) was permitted to recover the deposit from the auctioneer, on the ground, that in such transactions, good faith was most essential, and the vendor or his agent was bound to communicate to the vendee the fact of such notice (*n*).

Again, where a person, for whose life the property was held, was described to be "a very healthy gentleman," and in another passage, "a healthy gentleman," and the sellers had shortly before the sale insured the life at a sum exceeding the highest rate charged for a healthy life of the same age, the bill of the sellers for a specific performance was dismissed with costs (*o*).

If a purchaser knew that the description was false, he cannot, it seems, take advantage of it either at law or in equity (*p*).

(*l*) Loyes *v.* Rutherford, K. B., May 16, 1809. 1 Sugd. Vend. & Pur. 309.

(*m*) Grant *v.* Munt, Coop. 173.

(*n*) Stevens *v.* Adamson, 2 Stark. 422.

(*o*) Brealey *v.* Collins, 1 Young, 317.

(*p*) Dyer *v.* Hargrave, 10 Ves. 505.

Although the purchaser might, with proper precaution, have discovered the defect, yet, if, during the treaty, the vendor *industriously* conceals the fact, equity will not assist him (*p*).

The general representations which the vendor may make of the property, with the view of recommending it to a purchaser, are admitted only when they respect its value, or those other qualities on which the purchaser has the means of exercising his own judgment. It is the purchaser's own fault, if he has so much credulity as to place implicit confidence in the vendor's recommendation of the article he offers and desires to sell. "Ea quæ commendandi causâ in venditionibus dicuntur, si palam appareant, venditorem non obligant, veluti si dicat *servum speciosum, domum bene ædificatam*, at si dixerit *hominem literatum vel artificem*, præstare debet: nam hoc ipso pluris vendidit" (*q*).

The following commentary on this text of the civil law states the limits to which it is subject. "Ea ad nudam laudem pertinere, et commendandi causâ solùm dici videantur, quæ generaliter de bonitate rei prædicantur, non certo aliquo in genere laudis, aut artificii, aut bonitatis. Istiusmodi enim omnes de rebus vendendis prædicare solent, rem bonam esse, servum esse frugi, dicto audientem, postquam emtor emerit non velle emtam non esse. At cùm certum genus artificii, bonitatisve venditor expressit, propter quod res pluris vendi solet et talem se vendere dixit: sine dubio id præstare debebit, veluti si servum coquum esse dixit, si dixit esse peculiatum, si aliatorem non esse, non furem prædicavit, si pannum esse de notâ Rothomagensi, si Hispanicum, si aliunde denique esse affirmavit, et pro tali vendidit, quia hec omnia talia sunt, propter quæ pluris res emantur, et sine quibus interdum

(*p*) Shirly *v.* Stratton, 1 Bro. C. C. 140.
(*q*) Dig. lib. 18, tit. 1, l. 43.

omnino res emta non esset, ejusmodi dicta sunt, ut præstari oporteat: sic enim hæc dicuntur, ut præstentur, non ut jactentur: alioquin nominatim non designarentur. Postremò illud erit certum indicium aliquid dictum esse, ut præstetur, si propter id, quod dictum est, et rem talem esse affirmatum est, consecutus est venditor, ut pluris venderet. Id autem tum fit, cùm specialiter aliquid de re affirmat, propter quod res pluris esse solet, et talem se vendere profitetur" (*r*).

The doctrine of the Courts of Equity in England does not essentially differ from the rule thus qualified and limited.

It has been decided, that no relief lies against a vendor for having falsely affirmed that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase it, and was deceived in the value (*s*).

Neither is a purchaser relieved against a vendor for false affirmation of value; it is the purchaser's own folly to credit a rude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ (*t*).

An heritor having solemnly affirmed to his tacksman at setting the lands that there was paid by the preceding tenants for each acre a great deal more than really was paid, thereby induced him to take it at a very exorbitant rate, whereby he was injured *ultra dimidium*, yet continued to possess two years before he complained. It was decided by the Court of Session, "that the allegation of circumvention and fraud, both in *consilio* and in *eventu*, was not sufficient to reduce the tack, *and that the tenant should have informed*

(*r*) Donelli Op. 190. Cocc. ad lib. 18, tit. 1, q. 27. Brunneman, ad Pand. lib. 4, tit. 3, ad l. 37.

(*s*) Harvey *v.* Young, Yelv. 20. Dukenfield *v.* Whichcott, 2 Cha. Ca. 204. Ekins *v.* Tresham, 1 Lev. 102. Reported 1 Sid. 146, by the name of Leakins *v.* Clissel. Scott *v.* Hanson, 1 Sim. 13. Sherley *v.* Davis, 6 Vez. jun. 78. Loundes *v.* Lane, 2 Cox's case, 364.

(*t*) 1 Sugd. Vend. & Pur. 2, 5. 1 Rol. Abr. 101, pl. 16. See 1 Sid. 146. Dawes *v.* King, 1 Stark. 75.

himself better what was the true rent, and not have relied on the seller's assertion, and ought to have tried the quality of the ground, and his eye being his merchant, he had none to blame but himself, especially now, as he had acquiesced two years" (*u*).

But if a vendor affirm that the estate was valued by persons of judgment at a greater price than it actually was, and the purchaser act upon that misrepresentation, the vendor cannot compel the execution of the contract in equity, nor would he, it should seem, be permitted to maintain an action at law for non-performance of the agreement (*v*).

Fraud may consist in suppression or concealment, no less than in positive assertion or representation, "sicuti faciunt, qui per ejusmodi dissimulationem deserviunt et tuentur, vel sua, vel aliena." "Dolum malum à se abesse præstare venditor debet; qui non tantum in eo est, qui fallendi causâ obscuré loquitur, sed etiam qui insidiosé dissimulat" (*w*).

The concealment of defects which are not *patent,* and of which the purchaser has no knowledge, or the means of obtaining a knowledge, if they are of such a nature as would, had they been known to him, have deterred him from purchasing, affords a ground for rescinding the sale, or of entitling him to an abatement of the price:

"Si sciens reticuit, et emptorem decepit, omnia detrimenta, quæ ex eâ emptione emptor traxerit, præstaturum ei. Sive igitur ædes vitio tigni corruerunt, ædium æstimationem; sive pecora contagione morbosi pecoris perierunt, quod interfuit idoneè venisse, erit præstandum" (*x*).

(*u*) Kinnaird *v.* Lord Dean, 6th Dec. 1698, 2 Fount. 23.

(*v*) Buxton *v.* Cooper, 3 Atk. 383. Partridge *v.* Usborne, 5 Russ. 195. Small *v.* Attwood, 1 Young's Rep. 407, reversed in D. P. upon appeal, 6 Cl. & Fin. 232. 1 Sugd. Vend. & Pur. 4.

(*w*) Dig. lib. 4, tit. 3, l. 1, § 2. Ib. lib. 18, tit. 1, l. 43, § 2. Toullier, liv. 3, tit. 3, des Contrats, &c., c. 2, n. 88.

(*x*) Dig. lib. 19, tit. 1, l. 13. Cod. lib. 4, tit. 58, l. 1.

"Si quid tale fuerit vitii, sive morbi, quod usum ministeriumque hominis impediat, id dabit redhibitioni locum: dummodo meminerimus, non utique quodlibet quàm levissimum efficere, ut morbosus vitiosusve habeatur" (*y*). "Qui fortasse, si hoc cognovisset, vel empturus non esset, vel minoris empturus esset" (*z*).

A., a dealer in iron, was indebted to B., a manufacturer of pig iron, for goods previously purchased of him, and applied to him for more goods, and proposed to pay him 10*s.* beyond the market price for every ton of iron supplied to him, which sum of 10*s.* was to be applied by B. in discharge of the whole debt. B. acceded to this proposal, if the payments were secured by C. as surety. C. became surety for the goods to be supplied, but he was ignorant of the intended application of the 10*s.* It was decided that this arrangement was a fraud on the surety, and that he was not liable. It is obvious that, by this arrangement, the creditor would apply to the payment of the old debt a portion of those monies which the surety had a right to expect would be applied in paying for those goods for the payment of which he had made himself collaterally responsible, and that thus his risk was increased (*a*).

A. being indebted to B. in a sum of 500*l.*, and being desirous of a further loan, B. and A. agree, that B. shall advance A. the sum of 1,500*l.*, and that B. shall deduct from it to repay himself the sum of 500*l.* C., as surety for A., in ignorance of this agreement, and believing that A. had the benefit of the whole 1,500*l.*, instead of the sum of 1,000*l.* only, gives his promissory note to B. for the 1,500*l.* It was decided that the surety was not liable, that the security in the hands of the

(*y*) Dig. lib. 21, tit. 1, l. 1, § 8.

(*z*) Ibid. lib. 19, tit. 1, de Act Empt. l. 39. Ib. lib. 18, tit. 1, de Cont. Empt. l. 35.

(*a*) Pidcock *v.* Bishop, 3 B. & C. 605. S. C. 6 Dowl. & Ry. 505.

creditor was void on the ground of fraud (*b*). The creditors of A. agreed to accept a composition in discharge of their demands, upon having the composition money secured to them by a third party. One of the creditors privately prevails upon A. to give him security for the residue of his debt, the surety is discharged from his liability on the ground that the agreement is a fraud upon him, for it deprives the debtor of the benefit which the surety intended he should have (*c*).

The security is equally a fraud, if it be given to the creditor by the principal, after the deed of composition is executed, if it was in respect of the demand which existed before, and was so given in pursuance of an agreement entered into previously to the execution of the deed (*d*).

A debtor, whose affairs were embarrassed, proposed a composition with his creditors for 10*s.* in the pound. A creditor, to whom he owed 300*l.*, would not consent to it, and upon this, the debtor's brother wrote to this creditor, and spontaneously agreed, at his own cost, to supply this creditor with coals to the amount of 150*l.* if he would be a party to the agreement for the composition. To this agreement the creditor assented, and then signed the composition agreement to take 10*s.* in the pound to be paid with the other creditors. This creditor afterwards agreed to take the joint and several promissory note of the debtor, and of A. B., and another person, as his sureties. The note was given, and the debtor's brother furnished the creditor with coals to the amount agreed on. In an action, afterwards brought against A. B. upon the note, it was decided that A. B. was not liable, upon the

(*b*) Stone *v.* Compton, 5 Bing. N. C. 142.

(*c*) See Middleton *v.* Lord Onslow, 1 P. Wms. 768. Cecil *v.* Plaistow, 1 Anst. 202, and the observations of Buller, J., in Nerot *v.* Wallace, 3 T. R. 17.

(*d*) See Cecil *v.* Plaistow, *supra*.

ground that he had, by the amount in coals delivered by the debtor's brother, received as much as the other creditors, and that any contract for more was a fraud on them (*e*).

Even when the surety is a party to this agreement, yet, upon the ground of public policy, he will not be held responsible, though he be *particeps criminis*, the relief being given on account, not of the individual, but of the public. If one of several creditors had refused to concur in a composition deed, unless the debtor would secure to him the whole or some portion of his debt above what the other creditors would receive under the composition deed (*f*); or, if being satisfied with the composition money, he requires in like manner from the debtor, not a larger amount than the other creditors, but additional security (*g*), and in consequence thereof, a surety in behalf of such debtor with knowledge of these facts, but unknown to the other creditors, gives to the individual creditor the required security, such private agreement is a fraud upon the rest of the creditors, as it was an attempt to obtain a preference, where they had all agreed and supposed they were to participate equally, and the security given by the surety is void. An insolvent had been brought up before the Court for the relief of Insolvent Debtors, to be examined on his petition to be discharged out of custody. He was opposed by A., a creditor, and remanded to a future day. Before that day arrived, A., acting as the attorney of the insolvent, in consideration that C. would withdraw his opposition to the

(*e*) Knight *v.* Hunt, 5 Bing. 142.

(*f*) Jackman *v.* Mitchell, 13 Ves. 581. Coleman *v.* Waller, 3 You. & J. 212, Cockshott *v.* Bennett, 2 T. R. 763. Jackson *v.* Lomas, 4 T. R. 166. Morgan *v.* Bruen, Lloyd. & G. temp. Sug. 180, and the observations of Buller, J., in Stark *v.* Mawson, 1 Bos. & P. 286; and Lord Tenterden, C. J., in Jones *v.* Yates, 9 B. & C. 532.

(*g*) Leicester *v.* Rose, 4 East, 372, overruling Frize *v.* Randall, 6 T. R. 146, Ex parte Sadler *v.* Jackson, 15 Ves. 52.

insolvent's discharge, undertook that A. should be the sole assignee of the insolvent's estate, and guaranteed that A. should, as assignee, receive 100*l.* out of it, within three months from his appointment: it was held that this agreement was contrary to the policy of the Insolvent Act, and therefore void (*h*). An insolvent debtor had given to one of his creditors his promissory note as an inducement to withdraw his opposition to his discharge under the act, and having been, subsequent to his discharge, arrested by the creditor for non-payment of such note, settled the action by giving a warrant of attorney in which the debtor's brother joined to confess a judgment for the debt, costs, and interest, to be paid by instalments. This warrant of attorney was set aside even after payment of the first instalment (*i*).

If the agreement entered into between the surety and the creditor was fraudulent in its creation, no effect will be given to it (*j*); A., one of several creditors, obtained the promissory note of the surety to induce him to prevail upon the other creditors to discharge the debtor, by entering into a composition with him, and with the understanding that the note was to be kept a secret from the debtor's other creditors, but which object the debtor could not accomplish. A Court of Equity, upon the application of the surety, ordered all securities which had been given to the creditor to be delivered up to be cancelled, but the Court refused the surety his costs because he was *particeps criminis* (*k*).

The cases which have been hitherto noticed are those in which the fraud has been practised by one of the parties to

(*h*) Murray *v.* Reeves, 8 B. & C. 421.
(*i*) Rogers *v.* Kingston, 2 Bing. 441.
(*j*) Wells *v.* Girling, 1 Brod. & B. 447.
(*k*) Morgan *v.* Bruen, Lloyd & G. temp. Sug. 180. Debenham *v.* Ox, 1 Ves. 276, Eastbrooke *v.* Scott, 3 Ves. 456.

the contract. But the conduct of a third person may have influenced one of the parties in entering into the contract. It may be stated, as a general rule, that neither the party who practises the fraud, nor any third party, shall derive any benefit from it.

A third person shall neither suffer nor profit by the fraud of another (*l*).

Therefore, interests obtained through the fraud of another person cannot be maintained (*m*).

Relief was given against a fraud by which the husband of a tenant in tail prevented the completion of a recovery, and the wife, who was no party to the fraud, was not permitted to derive any advantage from the transaction (*n*).

There can be no fraud practised on a party who has the means of acquiring full knowledge of the subject-matter of the contract and of its defects. "Non decipiuntur qui non ignorant." If, therefore, defects in the property are patent, the purchaser is not entitled to be relieved from his contract: "Non tamen ea vitia venditori præstanda esse ex hôc edicto, quæ quis non ignoravit. Finge equum cæcum esse, claudum esse, cicatricem in capite aut aliâ parte corporis evidentem et periculosam habere: nihil venditori nocebit, etsi ea non palam esse dixerit. . . . . Ita jam ex sententiâ venditor non tenebitur. Idem dicemus, si quis ædes ruinosas vendendo in re præsenti ædes benè ædificatas dixerit: si servum deformem, speciosum. Nam hæc cùm palam sint, emptor deceptum se esse queri non

(*l*) Dougl. 229.

(*m*) 14 Ves. 289.

(*n*) 14 Ves. 290, Luttrell *v.* Olmius, 11 Ves. 638. Perez. Cod. lib. 8, tit. 26, n. 10. Matth. de Auct. lib. 1, c. 19, n. 86. Ibbottson *v.* Rhodes, 2 Vern. 554. Amy's case, cited 2 Ch. Ca. 128. Hobbs *v.* Norton, 1 Vern. 136. Dalbiac *v.* Dalbiac, 16 Ves. 125. Neville *v.* Wilkinson, 1 Bro. C. R. 543.

potest. Solùm id agitur hôc edicto, ne per silentium, et reticentiam venditorum emptores decipiantur" (*o*).

(*o*) Donelli Opera, de Ædil. Edict. p. 198. Grotius, de Jure Belli ac Pacis, l. 2, c. 12, § 9, 3. Puffendorf, de Jure Naturæ et Gentium, l. 5, c. 3, § 5. Voet, lib. 19, tit. 1, de Actionibus Empt. n. 15, and lib. 21, tit. 1, n. 9. 1 Sug. Vend. & Pur. 307. Toullier, tit. des Contrats, liv. 3, c. 2, n. 55. Brunnem. ad Pand. lib. 18, tit. 1, ad l. 15. Oldfield *v.* Round, 5 Vez. 508.

CHAPTER X.

MISTAKE.

Mistake or ignorance of facts avoids the obligation.—Instances of.—As to the person.—The property.—The essential quality.—The sum.—If the mistake does not affect the original debt, but merely the contract of suretyship, the surety only is discharged, and not the debtor or co-sureties.—Ignorance or mistake of the law.—Question amongst the commentators of the civil law, whether under any circumstances it afforded a ground for restitution.—The texts of the civil law.—Opinions of Vinnius and D'Aguesseau.—Decisions in France.—Code Civil.—Earlier decisions and present state of the law in England, and in several of the States of America.—In Massachusetts.—Louisiana.—The distinction where the ignorance is of a foreign law.

THE doctrine of the Civil Law is that the surety is discharged from his obligation, if it were entered into and contracted under an error of law or of fact. The language of the commentators is, "fidejussionem (quæ contractus est) errore, vel juris, vel facti contractam, et initam, nullam esse (*a*). Ubi Paulus ex hac ratione quod nimirum erroris nulla sit fidejussio, decidit, si quis, postquam transacto tempore liberatus esset, fidejussorem dederit, fidejussorem non teneri, erat enim debitor in principali obligatione, cui fidejussor accedere debebat, et sic error in jure committitur, cum obligationi præscriptæ fidejussor accedere de jure non possit" (*b*).

"Non videntur, qui errant, consentire" is adopted by every system of jurisprudence as a fundamental principle in estimating the obligatory effect of contracts. "Lorsque le con-

(*a*) Dig. lib. 46, tit. 1, l. 37.
(*b*) Ibid.

sentement n'a été donné *que par erreur*, j'ai fait ce que je ne voulais pas, et je n'ai pas fait ce que je voulais" (*c*).

The difficulty arises in making the proper application of this principle.

This error, or mistake, may regard the motive or consideration for the contract, or the person with whom it is made, or the subject-matter of it, or there may be mistake *juris* as well as *facti*.

A contract may be avoided on the ground that there has been a mistake in the matter, which constitutes the only or principal motive or consideration which induced the party to enter into it, and was known to be so by the party with whom he contracted.

The Code Civil affords an illustration of this species of error.

A compromise, proceeding on and originating in documents which are subsequently proved to have been false, or in respect of a suit treated as pending, but which had been terminated by a sentence, of which the parties, or one of them, had no knowledge, is null (*d*).

Another instance may be stated, where an annuity is granted on the life of a person who at the time of the contract was dead. The contract, in this case, has no effect (*e*).

The contract may also be avoided on the ground of error, in respect of the person with whom it is made, when the person, or the quality or character which he sustains, forms the only or principal cause of the contract (*f*). A compromise, made by the creditor of an intestate with a person, believed to be his

(*c*) Dig. lib. 50, tit. 17, de Reg. Juris, l. 116. Ib. lib. 44, tit. 7, de Oblig. et Act. l. 57. Toullier, liv. 3, tit. 3, n. 36.

(*d*) Art. 2054, 5, 6.

(*e*) Pothier, du Contrat de Const. de Rente, n. 225. Code Civil, Art. 1974.

(*f*) Dunlop *v.* Cruickshank, June 16, 1752. Elch. n. 25, Fraud.

heir, but who was not so, would be void (*g*). So he is also discharged if there was any mistake as to the subject-matter of the contract. "Si indebitam pecuniam quasi ex causa fidejussionis obstrictus in cautionem per errorem deduxisti, tam doli mali exceptione uti, quam condicere, ut obligatio tibi accepto feratur potes. Non est autem dubium, fidejussorem rei promittendi, bonis ad fiscum devolutis, si idem fiscus ob debitum restituendum fuerit conventus, et solverit, liberari" (*h*).

A sale, which has proceeded under a mistake of that which the one intended to sell, and the other intended to buy, is invalid. "Si igitur ego me fundum emere putarem Cornelianum, tu mihi te vendere Sempronianum putasti: quia in corpore dissensimus, emptio nulla est. Idem est, si ego me Stichum, tu Pamphilum absentem vendere putasti. Nam quum in corpore dissentiatur, apparet nullam esse emptionem" (*i*).

This is said to be a mistake *in corpore*.

The texts in the civil law treat also of a mistake *in substantiâ aut materiâ*, by which terms must be understood the essential qualities which constitute the thing which it professed to be, and which is intended to be sold and purchased, and not those which are accidental, and where the party only obtains compensation (*j*).

"Inde quæritur; si in *ipso corpore* non erratur, sed *in substantiâ* error sit, ut putà si acetum pro vino vœneat, æs pro auro, vel plumbum pro argento, vel quid aliud argento simile, an emptio et venditio sit? Marcellus scripsit, emptionem esse et venditionem, quia in corpus consensum est, esti in materiâ sit erratum. Ego in vino quidem consentio, quia eadem prope οὐσία (id est, substantia) est, si modo vinum acuit; cæterum,

(*g*) Toullier, liv. 3, tit. 3, c. 2, n. 40, *et seq.*

(*h*) Cod. lib. 8, tit. 41, l. 15.

(*i*) Dig. lib. 18, tit. 1, l. 9. Voet, lib. 18, tit. 1, n. 5, *et seq.* Noodt, Opera de Cont. Empt. tom. 2. 1 Sugd. Vend. & Purch. 318.

(*j*) Poth. ad Pand. lib. 18, tit. 1, § 35, l. 10. Voet, lib. 18, tit. 1, n. 6.

si vinum non acuit, sed ab initio acetum fuit, ut embamma, aliud pro alio vœnisse videtur. In cæteris autem nullam esse venditionem puto, quoties in materiâ erratur" (*j*).

If a purchaser of an estate think he has purchased *bonâ fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say one shall be forced to give that price for part only, which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only (*k*).

A mistake in respect of the price of the subject of the sale renders the contract void (*l*).

A mistake as to the sum for which the surety became bound would render the obligation void. "Idem plane in errore quoque facti, admittendum censeo, puta si fidejussor putet summam, pro qua fidem suam interponit, esse tantum centum. Joachioniorum, cum sit quingentorum. Est enim hic error in materia sivè summa, qui contractum vitiat." "Errare siquidem est aliud pro alio putare" (*m*).

There can be no consent if there be any mistake respecting the nature of the contract into which the parties enter. Thus, if the one party were desirous of selling to the other a certain house for a given sum, and the other party understood it was let to him for a term of years at that sum, there is in this case neither a sale nor a lease (*n*).

(*j*) Dig. lib. 18, tit. 1, l. 9, § 2. Noodt, Opera, tom. 2, sup. Bynkersh. Obs. Jur. Rom. lib. 6, l. 4. Pothier, Tr. de Cont. de Vente, n. 34, 35. Toullier, liv. 3, tit. 3, des Cont. c. 2, n. 55. Code Civil, Art. 1110. Voet, lib. 18, tit. 1, n. 5. Thornton *v.* Kempster, 5 Taunt. 786.

(*k*) See 13 Ves. 427. Higginson *v.* Clowes, 15 Ves. 516. 1 Ves. jun. 211. 6 Ves. 339, 1 Sugd. Vend. & Pur. p. 318.

(*l*) Dig. lib. 18, tit. 1, l. 9. Pothier, Tr. de Vente, n. 36. Sword *v.* Sinclairs, August 8, 1771, Dict. 14,241.

(*m*) Hering. de Fidejuss. cap. 19, p. 225.

(*n*) Dig. lib. 18, tit. 1, l. 9. Pothier, ib. n. 37.

An agreement, the sole or principal foundation of which has been the mistake or ignorance of the law, may on this ground be annulled.

The precise limits, and the correct application of the rule *ignorantia*, or *error juris neminem excusat*, have afforded a subject of controversy amongst jurists.

Public utility, no less than the concurrence of jurists, sanctions its application so far as to prevent a person from relieving himself from a duty, or protecting himself from the consequences of violating a prohibition imposed by the law, or from acquiring an advantage in opposition to the legal rights and interests of another. But there seems neither reason nor justice in allowing the ignorance of one man, who is under no moral obligation, to make and does not intend to make a gratuitous donation, and who is acting entirely or mainly under that ignorance, to be a title of adventitious acquisition to another.

The maxim which is established by the Code Civil as of one of its laws is, " il n'y a point de consentement valable s'il n'a été donné que par erreur" (*o*), is of universal application. If the consent were given only in consequence of error, the Code Civil does not admit, and in fact there cannot be any substantial distinction, whether the error be in a matter of fact or in a matter of law. Thus, the heir succeeding *ab intestato*, believes his nephew to be equally entitled with himself to the succession of the cousin german of the latter, and in this belief delivers to him a moiety of the estate of the deceased. It was his intention not to give any of his own property, but to deliver to his nephew that which he believed belongs to the latter. The delivery to him can be referred to no other motive than his supposed right to the property. The heir discovers that the nephew has no right, because the law does not admit him

(*o*) Art. 1109.

to the succession. Such an act, therefore, is null, and the property may be recovered (*p*).

This principle is fully sanctioned by the texts of the civil law. "Juris ignorantia non prodest acquirere volentibus, suum vero petentibus non nocet" (*q*).

"Cæterum omnibus juris error, in damnis amittendæ rei suæ non nocet" (*r*).

Upon these laws Pothier rests his proposition. "In eo autem conveniunt quòd, quidquid aliquis, sive per ignorantiam juris sive per ignorantiam facti gesserit, non ei obsit quominus rem suam reposcere aut retinere possit" (*r*).

When, however, the consent may be referred to another motive, or rather when it is not evident that the consent was given from no other cause but mistake of the law, there is no ground for admitting the party to relieve himself from the act. If in the case which has been put, the heir had been a co-devisee with his nephew under a will not duly executed to pass the property, and in ignorance of the law had delivered to his nephew a moiety of the succession, he cannot afterwards, on discovering that the will was inoperative, recover it back. Here it is not clear, nor is it capable of being proved, that his only motive was that which originated in his mistake respecting the validity of the will. It might have been his desire, from respect to the memory of his ancestor, to discharge a duty, although of imperfect obligation, by performing his will. With these two motives, by which he might have been influenced, the presumption is that he acted under the latter. *In dubio, error nocet erranti.*

The Code Civil adopts this principle. Confirmation or

(*p*) Dig. lib. 10, tit. 2, de Fam. Exerc. l. 36.

(*q*) Dig. lib. 22, tit. 6, l. 7.

(*r*) Ib. l. 8. Pothier, ad Pand. lib. 22, tit. 6, § 2, n. 2. Domat, liv. 1, tit. 18, n. 14. Toullier, liv. 3, tit. 3, n. 66.

ratification, or the voluntary carrying into effect of a gift by the heirs or assigns of the donor, after his decease, implies their renunciation of setting up either the defects of form or any other exceptions (*s*).

It is quite clear that a mistake of the law can never be a ground for setting aside a compromise which has been entered into respecting a litigated or doubtful claim, because the very foundation of the compromise is, that both parties are ignorant of, or are doubtful as to the law by which the question should be decided (*t*).

A purchase, in which the consent had been given solely or principally from a mistake in law, would be rescinded. Even those jurists who maintain that a payment made under an ignorance of law cannot be recalled, do not extend their doctrine to executory agreements, and the distinction is thus expressed by Heineccius. "Distinguendum, utrum ex ignorantiâ juris rem tradiderim eamque velim actione repetere, an eam promissam ex hujusmodi ignorantiâ adhuc possideam, et de eâ retinendâ sum sollicitus. Priore casu, inquiunt leges, ignorantia nocet (*u*), posteriore non nocet, sed promittens exceptione tutus est" (*v*).

The doctrine of the Courts of Equity in England is in conformity with the view which has been taken of the effect of a mistake in inducing a party to make a contract of sale.

It has been decided, that in a deed executed between a brother and a sister, a general release was not binding as to the rights of which the parties were ignorant at the time. "If the party releasing is ignorant of his right, or if his right is concealed from him by the person to whom the release is made, there will be good reasons for the setting aside of the release."

(*s*) Art. 1340.
(*t*) Code Civil, Art. 2044.
(*u*) Dig. lib. 22, tit. 6, l. 10.
(*v*) Heinecc. Opera, ad Pand. lib. 22, tit. 6, § 146, note.

The Court never holds parties acting upon their rights (doubts arising as to those rights) to be bound, unless they act with full knowledge of all the doubts and difficulties that arise (*w*).

If a party acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property, to another under the name of compromise, a Court of Equity will release him from the effect of his mistake (*x*). But where a doubtful question arises, such as a question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them, in the proportions which may be agreed upon (*y*).

A party had devised an *estate tail* in certain lands to D., his eldest son and heir, limiting the *reversion in fee to his own heirs*. D. left no issue, but devised the estate to the plaintiff in fee. The latter, being ignorant of the law, and persuaded by the defendant and his scrivener and conveyancer, that D. had no power to make such devise, and being also subject to an action of ejectment, purchased the estate of the defendant for 80*l*., and it was conveyed to him by lease and release. A bill was filed to have this money repaid with interest. The defendant by his answer first of all insisted that D. had no power to make such devise; but if he had, he urged that the plaintiff should have been better advised before he parted with his money, for that all purchasers were to be at the peril of the purchaser. The decree was for the money, with interest and costs (*z*).

In treating of the effect of an obligation contracted under a mistake or ignorance of the law, an acquaintance with the principles on which this question has been considered would

(*w*) Ramsden *v.* Hylton, 2 Ves. 304. Cole *v.* Green, 1 Ves. 306.
(*x*) Gibbons *v.* Caunt, 4 Ves. 849.
(*y*) 1 Sim. & Stu. 562, 3, 4, 5.
(*z*) Bingham *v.* Bingham, Belt's Sup. to Vesey's Rep. 79.

be imperfect if some reference was not made to the doctrines which have been held on the right to recover back that which has been paid under an ignorance of law.

It formed a subject of controversy amongst the commentators on the Roman law, whether, under any circumstances, it allowed the recovery of a payment made under an ignorance or mistake of law. The text on which the negative of this proposition is maintained, is the law, "cum quis jus ignorans, indebitam pecuniam solverit; cessat repetitio. Per ignorantiam enim facti tantum repetitionem indebiti soluti competere tibi notum est" (*a*). Where a person, ignorant of the law, pays money which is not due, the right of recovery ceases, for recovery is only allowed in cases where what is not due is paid, in consequence of an error in fact. But to this text is opposed the law by Papinian: "Juris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet. Error facti ne maribus quidem in damnis vel compendiis obest: juris autem error nec feminis in compendiis prodest: Cæterum omnibus juris error in damnis amittendæ rei suæ non nocet" (*b*). An ignorance of law does not avail those who are desirous of acquiring, and does not injure those who merely seek their own. An error in law does not subject any person to the injury of losing his property. Therefore, wherever the question relates to avoiding or repairing a loss, an ignorance of the law does not induce any prejudice.

It is contended, by the advocates of this opinion, that the first cited text is of universal application, and is not confined to those cases in which, although there might have been no *legal* yet there was a moral or natural obligation to make the payment, and that therefore the person to whom it was made, has a right *in foro conscientiæ* to retain it. They endeavour

(*a*) Cod. lib. 1, tit. 18, l. 10.
(*b*) Dig. lib. 22, tit. 6, l. 7, 8.

to reconcile the second text, by insisting that the cases in which the *error juris* does not prejudice, are those in which the party is contending *de amittendâ re*, and that, if he has parted with his property, even under an ignorance of the law, it ceases to be his, and that in seeking to recover it, he is not *petens suum*, or *in damnis amittendæ rei suæ*, but that he is *volens adquirere*, for its recovery is *in compendiis*. It has been justly observed, that it cannot be said a man is deriving a gain from his error in law, when he recovers back his own property. "Et tantum non ridiculum est, quod aiunt errorem juris solventi profuturum ad lucrum, si rem recuperaret, eo quod translato per solutionem rei dominio, jam de novo eam acquirere videatur. Quasi vero damno non afficiatur, qui dominium rei suæ in perpetuum amittit, aut lucrum sentiat, cui damnum resarcitur. Lucrum non intelligitur, nisi quod deducto damno superest; nihil autem amplius hâc conditione recuperatur, quâm quod damnum abstulit" (*c*).

Those who are opposed to this opinion, insist that the first text is to be understood as applying only to those cases in which the payment has been made under a natural or moral obligation, and where, therefore, there is nothing unconscientious in the person retaining the payment. Such is the construction given to it by Vinnius and D'Aguesseau, and there has never been any satisfactory answer given to the reasoning by which they thus render consistent two laws apparently contradictory. They shew that, in those cases where it is admitted that a recovery may take place, the ignorance under which the payment was made, was that of law and not of fact, and that in those cases where the recovery is not allowed, the party is debarred from relief, not because the payment was made under an ignorance of the law, but because there was still a subsisting natural or moral obligation

(*c*) Vinn. Sel. Quæst. lib. 1, c. 47, p. 125.

under which it may be considered to have been made, and under which the party receiving might retain it. Thus, in illustration of the rule, "ignorantia juris suum petentibus non nocet," a case is mentioned of a person who stipulates for a slave to be given to him, of the value of twenty guineas, the slave being dead before any delay in the delivery, the promiser, supposing himself to be still bound by the stipulation, pays the twenty guineas, the law assists him, because his claim is founded upon the loss of the money, and he is entitled to recover it (*d*).

Here the error is manifestly an error of law. The promiser is ignorant of that trite and common rule, that the debtor of a specific thing is liberated by its happening to perish, if he is not guilty of any delay in the delivery.

Again, the *Senatus Consultum Macedonianum* provided that no action could be maintained for money lent to a son under the power of his father. If the sum lent in contravention of this law, was repaid by the son on becoming his own master, it could not be recovered back, not because the exception which the S. C. gave was a matter of law, but because it was an exception *in odium creditoris*, or rather because the natural and moral obligation to repay the money existed. On the contrary, this case states a qualification of the law. "Qui exceptionem perpetuam habet solutum per errorem repetere potest" (*e*).

They also found their construction of the law on its obvious tendency to promote, whilst the opposite opinion must defeat, the two great principles of natural equity inculcated by the civil law. "Jure naturæ æquum est neminem cum alterius detrimento et injuriâ fieri locupletiorem" (*f*); and "Id quod

(*d*) D'Aguesseau, Diss. sur l'Erreur de Droit, p. 658, *et seq.*
(*e*) Dig. lib. 12, tit. 6, l. 40.
(*f*) Ibid. lib. 50, tit. 17, l. 206; lib. 12, tit. 6, l. 14.

nostrum est sine nostro facto ad alium transferri non potest"(*g*). Even the very origin of the *condictio indebiti*, which is *ex æquo et bono introducta*, seems to require this construction.

The conclusion of Vinnius is "quod per errorem juris solutum est, repetitionem esse, si nulla subsit naturalis obligatio" (*h*). The recovery should be allowed of that which is paid under an ignorance of law, provided there is not any natural obligation.

The Chancellor D'Aguesseau has adopted this same conclusion: "Quid igitur restat, nisi ad sæpiùs laudatam distinctionem confugere, et fateri, juris errorem non nocere, cum nullo jure nec civili nec naturali, tenebatur is qui indebitum solvit; contrà si jure naturali alligatus fuisset, et errore juris solvisset, meritò ei condictionem denegari, adeò ut hæc sit certa et constans regula, ei qui naturâ debet, tunc tantum repetitionem indulgeri, cum in facto errans pecuniam civiliter indebitam solvit" (*i*). It has been followed by Huber (*j*). It was also the opinion of the earlier jurists (*k*).

There must be added to the number of its opponents, Voet and Pothier. The reasoning of Vinnius is not answered by the former, and Pothier has not bestowed any discussion on it (*l*).

(*g*) Ibid. l. 11.

(*h*) Vinn. Sel. Quæst. c. 47, lib. 1, p. 123.

(*i*) D'Aguesseau, Diss. sur l'Erreur de Droit, p. 660.

(*j*) Huber, ad Inst. lib. 3, tit. 28; and ad Dig. lib. 12, tit. 6, and lib. 22, tit. 6.

(*k*) Zas. ad Rubr. de Cond. Ind. n. 5. Sichard. ad Cod. lib. 1, tit. 18. Wissenb. ad Cod. lib. 1, tit. 18, n. 9. Tulden, ad Cod. lib. 4 tit. 5, n. 4. Grot. lib. 3, Introd. ad Jurisp. Batav. c. 30. Christin. vol. 3, decis. 8. Bachov. vol. 2, disp. 4, thes. 12, p. 196. Brun. ad. l. 7, lib. 22, tit. 6. Zoes. ad Pand. lib. 12, tit. 6. Carpz. Part 3, const. 15, def. 42.

(*l*) Cujac. 5, obs. 39. Duar. ad Pand. lib. 12, tit. 6, § 3. Donell. 1 Com. 21. Bronchorst. 2 ass. 36. Perez. in Cod. lib. 4, tit. 5, n. 12. Voet. lib. 12, tit. 6, and lib. 22, tit. 6. Poth. Tr. de Condict. Indeb. n. 162.

The decisions in France were in conformity with the opinions of Vinnius and D'Aguesseau. Thus, where a person who was of full age, on whom alone, by the *coutume*, a succession had devolved, had, in ignorance of this *coutume*, for many years, in the most formal, public, and private acts, recognized his three nephews as his co-heirs, it was held that he was entitled to recover that, which under this ignorance, he had allowed them to receive (*m*).

The Code Civil has in this instance adopted the opinion of D'Aguesseau rather than that of Pothier, and allows the person who has made the payment *par erreur* to recover it. "Lorsqu'une personne qui, par erreur, se croyait débitrice, a acquitté une dette, elle a droit de répétition contre le créancier" (*n*). It makes no distinction whether it be error of law or of fact. There are, however, two cases, and two only, in which it does not allow error of law to avoid the act. The one is where there is a transaction or compromise. "Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort. Elle ne peuvent être attaquées pour cause d'erreur de droit, ni pour cause de lésion" (*o*). The other is that of a judicial confession. "L'aveu judiciaire ne peut être revoqué à moins qu'on ne prouve qu'il a été la suite d'une erreur de fait. Il ne pourrait être révoqué sous prétexte d'une erreur de droit" (*p*).

In Scotland, the Court of Session had in many instances adopted a similar doctrine (*q*), but it has been since shaken by a decision in the House of Lords (*r*).

(*m*) Augeard, tom. 1, p. 134. Toull. liv. 3, tit. 3, ch. 2, n. 66.

(*n*) Art. 1377.

(*o*) Art. 2052.

(*p*) Art. 1356.

(*q*) Ersk. b. 3, tit. 3, § 54. Stirling, July 26, 1775, Dict. 2930. Carrick, August 5, 1778, Dict. 2931. 2 Hailes, 783, Keith, Nov. 14, 1792, Dict. 2933.

(*r*) Wilson *v.* Sinclair, Dec. 7, 1834. 4 Wils. & Shaw, 398.

In the earlier decisions of the Court of Chancery in England, relief was granted in respect of a mistake of law. A father made his will, giving (*inter al.*) to his daughter 10,000*l.*, upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the city of London, or otherwise, and made his son executor, his daughter being about the age of twenty-three years.

The circumstances of the case are stated in the following judgment by the Lord Chancellor: "I do not see that any manner of fraud has been made use of in this case, but still it seems hard a young woman should suffer for her ignorance of the law, or of the custom of the city of London, or that the other side should take advantage of such ignorance.

"It is true, it appears the son (the defendant) did inform the daughter that she was bound either to waive the legacy given by her father, or to release her right by the custom; and so far she might know that it was in her power to accept either the legacy or orphanage part; but I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that, when she should be fully apprized of this, then, and not till then, she was to make her election, which very much alters the case; for probably she would not have elected to accept her legacy, had she known or been informed what her orphanage part amounted unto, before she waived it and accepted the legacy."

It appears that the suit was afterwards compromised (*s*).

In another case there were four brothers, the second died, and the eldest brother entered upon his lands; the youngest brother claimed the lands. They apply to Hughes, a schoolmaster, their neighbour in the country, (who often acted as an

(*s*) Pusey *v.* Desbouvrie, 3 P. Wms. p. 322.

attorney,) for his opinion, who, upon consulting the "Clerk's Remembrancer," gave it in favour of the youngest brother, because the lands could not ascend; upon which the eldest brother agreed to divide the estate with the youngest, and declared he would rather do so than go to law, though he had the right. Upon which Mr. Hughes prepared deeds of lease and release of the moiety, which were executed by the eldest brother, and bonds in the penalty of 300*l.*, which was computed to be the value of the moiety, conditioned for quiet enjoyment of their respective shares; the youngest brother died, and the moiety descended to the defendant, the infant, his son and heir; and the Lord Chancellor decreed, that the bonds, and deeds of lease and release, should be delivered up to the plaintiff, the eldest brother, being obtained by mistake and misrepresentation, and that the defendant, the infant, when he came of age, should convey, *nisi*, &c.; and his Lordship said, that the maxim of law "Ignorantia juris non excusat," was, in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases (*t*).

A similar opinion was expressed at law by Lord C. J. De Grey. "When money is paid by one man to another, on a mistake either of fact or of law, or by deceit, this action will certainly lie (*u*).

Lord Mansfield lays down the rule thus generally, where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action (*v*).

(*t*) Lansdown *v.* Lansdown, Mosely's Rep. 364. S. C. 2 Jac. & Walk. 206. Turner *v.* Turner, 2 Rep. in Ch. 81. Farewell *v.* Coker, 2 Merr. 353. Ramsden *v.* Hylton, 2 Ves. 304. Bingham *v.* Bingham, 1 Ves. 126. Belt's Sup. 79.

(*u*) Farmer *v.* Arundel, 2 Bla. Rep. 825.

(*v*) Bize *v.* Dickason, 1 T. R. 287. Lowrie *v.* Bourdieu, Doug. Rep. 471.

But in another case Mr. Justice Buller stated, without any dissent being expressed by Lord Mansfield, that if the law be mistaken, the rule applies that "Ignorantia juris non excusat."

Lord Ellenborough, C. J., in a subsequent case, after asking the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily, with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? and receiving no answer, observed that, "The case of *Chatfield* v. *Paxton* is the only one I ever heard of, where Lord Kenyon, at *Nisi Prius*, intimated something of that sort. But when it was afterwards brought before this Court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise grounds the case turned, that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case" (*w*).

This question was again the subject of judicial decision in the Court of Common Pleas. The Court, with the exception of Mr. Justice Chambre, held that, where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and it may be, his subsequent opinion may be the correct one (*x*).

Mr. Justice Chambre thus expressed his dissent from this opinion: "I am not aware of any particular danger in extending the law in cases of this sort, for they are for the furtherance

(*w*) Bilbie *v.* Lumlie, 2 East, 470, 471, 472.
(*x*) Brisbane *v.* Dacres, 5 Taunt. 152.

of justice; neither do I see the application of the maxim used by Buller, J., in the case of *Lowrie* v. *Bourdieu*, and cited by the Court in *Bilbie* v. *Lumley*, 'ignorantia juris non excusat;' it applies only to cases of delinquency, where an excuse is to be made. I have searched far to see, if I could, any instance of a similar application of this maxim. It seems to me a most dangerous doctrine, that a man getting possession of money, to any extent, in consequence of another's ignorance of the law, cannot be called on to repay it" (*y*).

In a subsequent case, the same doctrine is maintained, and it was held, that the defendant, who had made the promise with the full knowledge of the circumstances, could not afterwards defend himself upon the ground of his ignorance of the law when he made the promise (*z*).

The later doctrine of the Courts of common law has been adopted by the Courts of Equity in England. Lord Eldon says, "It is admitted, that at law it is impossible to recover, after a voluntary payment, with a knowledge of all the facts, though under a mistake in point of law; it cannot be disputed: and although, in one of these cases (*a*), there was a difference of opinion among the Judges, yet it is now settled, that where an action is brought and is proceeding, and the defendant having a knowledge of all the circumstances, and having the means of proving them at the trial, submits to pay, he has no remedy at law. The principle applies equally to suits here" (*b*).

Another eminent judge in a subsequent case, stated it to be "a maxim of equity, that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake. When, however, they make a mistake in law,

(*y*) Brisbane *v.* Dacres, 5 Taunt. 159.
(*z*) Stevens *v.* Lynch, 12 East, 39.
(*a*) Brisbane *v.* Dacres, *ubi supra.*
(*b*) Goodman *v.* Sayers, 2 Jac. & Walk. 263.

they cannot be afterwards heard to say, that the contract shall on that account be set aside (*c*)."

A doctrine equally extensive has been held in the Court of Chancery in New York (*d*).

But in Massachusetts it has been decided, that money paid under a mistake of law might be recovered back; and at all events, that a promise to pay, under a mistake of law cannot be enforced (*e*).

The Louisiana Code adopts the doctrine of Vinnius and D'Aguesseau. It allows error in law, as well as of fact, to invalidate a contract, where such error is its only or principal cause, unless the contract made under such error, fulfilled any such natural obligation as might, from its nature induce a presumption that it was made in consequence of the obligation, and not from error of right. In the latter case, such error is not allowed to avoid the contract. Thus, the natural obligation to perform the will of the donor, prevents the donee from reclaiming legacies or gifts he has paid under a testament, void only for want of form (*f*).

The Louisiana Code adopts the exceptions of the Code Civil, and does not allow a contract, made for the purpose of avoiding litigation, to be rescinded for error of law (*g*). And although a judicial confession of a debt may be avoided by showing an error of fact, yet it cannot be avoided by an allegation of an error of law (*h*).

(*c*) Marshall *v.* Collett, 1 Younge & Col. 238.

(*d*) Shotwell *v.* Murray, 1 Johns. Ch. Rep. 512, 516. Storrs *v.* Barker, 6 Ibid. 166. Clark *v.* Dutcher, 9 Cowen's Rep. 670. Hunt *v.* Rousmaniere, 1 Peter's Sup. C. R. 15. S. C. 8 Wheaton, 211, 212. Hepburn *v.* Dundas, 1 Wheaton, 179, 195. Lyon *v.* Richmond, 2 Johns. Ch. Rep. 51, 60.

(*e*) May *v.* Coffin, 4 Mass. Rep. 342. Warden *v.* Tucker, 7 Ibid. 452. Freeman *v.* Boynton, Ibid. 488. Haven *v.* Foster, 9 Pick. 112. Story's Equity Jurisp. 122, n.

(*f*) Tanner *v.* Robert, 5 Martin's Rep. N. S. 260.

(*g*) Lyles *v.* Martin, 5 Louisiana Rep. 113.

(*h*) Mead *v.* Chadwick, 8 Martin's Rep., N. S. 295.

II. It may here be useful to inquire whether the effect of ignorance of law is the same if it be a foreign law, or the law of the country of which the party is a subject. There may be no difficulty in admitting the doctrine, that a person who contracts in a foreign country, engages for a competent knowledge of the law of contracts of that country (*i*); "Qui cum alio contrahit, vel est, vel esse debet non ignarus conditionis ejus (*j*);" and that he cannot relieve himself from his contract by alleging his ignorance. But the principle on which it rests will not reach those cases in which the party is connected with the foreign country by the act of law, and not by his own act.

Thus, a succession being in a foreign country may be governed by a law perfectly different from that of the country in which those on whom it had devolved are domiciled. They deal with it under an entire ignorance of that law, and under a belief that it is governed by a law similar to that of their own country. A case of this description became the subject of judicial decision in the Supreme Court of the State of Massachusetts. A citizen of that State died there intestate, being seised of real estates in that State, and also in the State of New York, leaving a niece the child of one of his sisters, and three nephews the children of another sister, his heirs at law. By the law of Massachusetts, the real estate in that State descended equally on the niece and the three nephews. But by a statute of New York, the land in that State descended, one moiety to the niece, and the other moiety to the nephews. The niece, with her husband, and the other heirs, sold the land in New York by a joint deed of release and quitclaim, and the purchaser

(*i*) Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hagg. Cons. Rep. 61.

(*j*) Dig. lib. 50, tit. 17, l. 19. Grotius, b. 2, c. 11, § 5. Emerig. Diss. c. 4, § 8. Casareg. Disc. 179, n. 60, 61, 62. Hertius, de Coll. Leg. Sect. 4, § 10.

gave to the husband, and the three nephews, each a bond for one quarter of the purchase-money, all parties being ignorant of the statute. The bonds were paid to the respective obligees. The husband on discovering that half of the land descended to his wife, brought assumpsit against one of the nephews to recover one-third of one-fourth of the purchase-money, and the action was sustained (*k*).

So the husband was held entitled to recover of the nephew in the like proportion, where upon the sale of land in New York, a part of the consideration was paid at the time of the purchase, and divided equally among the four heirs (*k*).

It is obvious that a similar case may be of frequent occurrence. In England, the law of succession is different, from that of the British colonies in which the laws of Holland, Spain, and France prevail, and in cases of intestacy where the ancestor leaves no issue, from that of other British colonies (*l*).

The decision which has been referred to rests on grounds which appear satisfactory. It is the admitted doctrine, 1st, That although the Court takes notice of the law of its own country, it does not take notice of that of another country. 2ndly, that the foreign law is a fact which is to be proved (*m*). 3rdly, That in the absence of such proof, the Court presumes the law of the foreign country not to differ from its own law; that is, it deals with the case according to its own law (*n*).

(*k*) Haven *v.* Foster, 9 Pickering's Rep. 112.

(*l*) 3 & 4 Wm. 4, c. 106.

(*m*) Mostyn *v.* Fabrigas, Cowp. 174. Male *v.* Roberts, 3 Esp. 163. Douglas *v.* Brown, 2 Dow & Clarke, 171. Brown *v.* Gracey, cited in Lacon *v.* Higgins, 2 Dowl. & Ry. 41. 2 Stark's Evid. 331.

(*n*) De Sobry *v.* De Laistre, 2 Harr. & Johns. 193. Trasher *v.* Everhart, 3 Gill & John. 234. Brackett *v.* Norton, 4 Conn. Rep. 517. Talbot *v.* Seeman, 1 Cranch, 38. Church *v.* Hubbart, 2 Cranch, 187, 236, 237. 4 Cowen, 515, 516, note. Consequa *v.* Willings, Peter's Cir. Rep. 229. Legg *v.* Legg, 8 Mass. Rep. 99. Hosford *v.* Nichols, 1 Paige, 220.

The principle on which the party is precluded from relieving himself from the effect of an ignorance of the law of his own country, is founded on a presumption that he is bound to be acquainted with that law. He is not however bound, nor is the judicial tribunal of his country bound, to know the law of a foreign country. It does not seem reasonable to make him suffer from an ignorance of a law with which he is not bound to be acquainted. Again, as the foreign law is a fact, and proved as such, his ignorance of that law ought to be treated in the same manner as his ignorance of any other fact.

A distinction founded on the law not being that of the country to which the party belonged, seems to be recognized by Voet (*o*), and it is by other jurists expressly admitted. "Juris peregrini ignorantia parit restitutionem in integrum (*p*). Ignorantia juris singularis, ut statutorum, intuitu extraneorum non est ignorantia juris, nec unquam nocet (*q*) extra quam si ipse civis jus civitatis, in quo quotidie versatur, ignoret (*r*)."

It seems that where there are two or more sureties, the mistake, which might discharge the one who had entered into the contract under the mistake, would not discharge the others (*s*). "Fidejussoris autem conventio nihil proderit reo: quia nihil ejus interest, a debitore pecuniam non peti imo nec confidejussoribus proderit: neque enim, quoquomodo cujusque interest. Cum alio conventio facta prodest; sed

Serright *v.* Galbraith, 4 Dall. 327. Norwood *v.* Green, 5 Martin's N. S 176, and ib. 254. 4 Martin's N. S. 419. Crozier *v.* Hodge, 3 Louisiana Rep. 351. Campbell *v.* Miller, 3 Martin's N. S. 149. Story's Com. p. 528.

(*o*) Voet, lib. 22, tit. 6, n. 2.

(*p*) Boehm. in Introd. ad D. tit. de Jure and Fact. Ignor. § 3, et in Dec. et Cons. t. 2, p. 1, dec. 139, n. 22.

(*q*) Hommel. Rhaps. Observ. 154.

(*r*) Wernh. t. 1, p. 5, obs. 50, et Suppl. Menke, D. L. 22, tit. 6, § 5. Muller's Prompt. Ignor. Juris et Facti, n. 38, 43.

(*s*) Hering. de Fidejuss. c. 19.

tunc demum, cum per eum, qui exceptio datur, principaliter ei, qui pactus est proficiat: sicut in reo promittendi, et his, qui pro eo obligati sunt" (*t*). But if the surety, who had at first entered into the contract under a mistake, afterwards became aware of the mistake, but takes no step to correct it, and still continues the contract, he will be considered to have acquiesced in and ratified the contract (*u*).

(*t*) Dig. lib. 2, tit. 14, l. 23.
(*u*) Hering. ibid. 10.

CHAPTER XI.

CONFUSION.

I. Nature of.—Excluded by the heir entering under benefit of inventory. —Effect on the obligation of the surety.—Law of Scotland.—Revival of the obligation when the cause of confusion ceases.

II. By the law of England a similar effect takes place on the marriage of debtor and creditor.—The appointment of the debtor to be executor. —In a Court of Equity the debt will be assets.—Similar doctrine of the Courts of America.

THE obligation of the surety is extinguished if he become the heir of the creditor, or if the debtor should become the heir of the creditor, or *vice versâ*, if the creditor become the heir to the surety, or to the debtor. This union in the same person of the rights of the creditor and the obligations of the surety or debtor, in respect of the same debt, is designated in the civil law, and in the jurisprudence of Holland, Spain, France, and Scotland, by the term *confusion*. As the heir succeeds to all the rights of the deceased, active as well as passive, he becomes in the character of heir debtor for the very debt of which he is creditor on his own account. So, if the debtor becomes the heir of his creditor, he becomes in that his quality of heir, creditor of that same debt of which he is debtor on his own account (*a*).

The same legal consequence follows when the creditor succeeds to the debtor by any other title, which renders him

(*a*) Dig. lib. 46, tit. 1, l. 21, § 3; l. 38, § 1; lib. 50; tit. 3, l. 34, § 8; l. 75. Voet, lib. 46, tit. 3, n. 19. Pothier, Tr. des Oblig. n. 642. Toullier, liv. 3, tit. 3, ch. 5, n. 421, *et seq*. Erskine, b. 3, tit. 4, § 23, 24. Codrington, March 31, 1824, 2 Shaw's App. Cas. 118. Hog, Dec. 11, 1832, 11 S. & D. 198.

subject to the debts of the latter, as if he is his universal donatary, or when the debtor succeeds by any other title to the right of the creditor, or when the same person becomes the heir both of the debtor and creditor, or succeeds to both of them under any universal title (*a*).

This confusion does not take place unless the heir has adiated the succession, and even after his adiation, it is prevented, if the heir enter on the succession under the benefit of inventory (*b*).

If the person who was only creditor for part becomes sole heir of the debtor, the confusion and extinction will only take place as to the part for which he is creditor, and *vice versâ*, if a creditor of the whole becomes heir of the debtor for part, the confusion only takes place with respect to that part (*c*).

So, if the creditor is only one of several heirs to the debtor of the whole, the confusion and extinction will only take place as to the part for which he is heir, and for which he is liable to all the other debts of the succession; the demand still exists against the others; as, if one of several joint debtors should become the heir to the creditor, or if the creditor should succeed as heir to one of his several joint debtors, or if one of several joint obligees should succeed to their debtor, or the debtor should succeed to one of the several joint obligees, in either of these cases the obligation itself is not extinguished, but this confusion affects that person only with respect to whom it has taken place, but the other debtors still remain liable (*d*).

(*a*) Ibid.

(*b*) Dig. lib. 46, tit. 3, l. 95, § 2; lib. 36, tit. 1, l. 59; l. 80; lib. 35, tit. 2, l. 1, § 18. Cod. lib. 6, tit. 30, l. 22, § 9. Voet, lib. 28, tit. 8, n. 24. Grotius, Manud. ad Jur. Holl. lib. 3, c. 40, n. 6. Pothier, Tr. des. Oblig. n. 642. Code Civil, Art. 802. Toullier, liv. 3, tit. 3, c. 5, n. 424, 436. Erskine, b. 3, tit. 8, § 70.

(*c*) Ibid. Voet, lib. 46, tit. 3, n. 22.

(*d*) Ibid.

So, if a person had become surety for two joint debtors by succeeding to or being succeeded by one of them, he is discharged only as to him in respect of whom he has succeeded; he still remains liable for the other debtor. The same may be said, if this confusion had occurred between the surety and one of several joint obligees or creditors; he would still be liable to the action (*e*).

There is no confusion when one of the co-debtors or co-obligees succeeds as heir to the other (*f*).

The extinction of the principal debt by confusion when the creditor becomes heir of the principal debtor, or *vice versâ*, operates as an extinction of the obligation of the sureties (*g*).

The law of Scotland, when the principal debtor succeeds as heir to the cautioner, or the cautioner to him, does not adopt the rule of the civil law by treating as extinguished the accessory obligation. But on the contrary, it allows both the principal obligation and accessory to subsist, so that the creditor may use diligence against the estate of the deceased cautioner, who is still accounted the proper debtor in regard of the creditor, and upon such diligence he will be preferred before the creditors of the heir (*h*).

If the creditor becomes the heir of the surety, or the surety the heir of the creditor, the obligation of the surety is extinguished (*hh*).

But the extinction of the accessory obligation of the surety by confusion, does not operate as an extinction of the principal obligation as against the principal debtor: "Si creditor fide-

(*e*) Voet, ib. n. 23.

(*f*) Voet, lib. 46, tit. 3, n. 22, 23, 24, 25.

(*g*) Dig. lib. 46, tit. 1, l. 38, § 1; tit. 3, l. 34, § 8; lib. 50, tit. 17, l. 129, § 1; lib. 33, tit. 8, l. 2. Pothier, Tr. des. Oblig. n. 644. Voet, ib. n. 20, 21. Hering. de Fidejuss. c. 20, § 16.

(*h*) Ersk. b. 3, tit. 4, § 25. (*hh*) Hering. ib. §. 16.

jussori hæres fuerit vel fidejussor creditori: puto convenire, confusione obligationis non liberari rerum" (*i*).

The principal obligation may subsist without the accessory, although the accessory cannot subsist without the principal (*j*).

The obligation, although dissolved, may again be revived either by express agreement, or by the cause which produced the confusion having ceased, as, when a minor is relieved against his adiation, or the inheritance recovered from the supposed heir (*k*).

II. According to the law of England, the marriage of debtor and creditor operates as an extinction of their respective rights and obligations, and they do not revive upon the death of either of the parties, except with respect to those contracts and obligations which contemplate a provision for the wife after the husband's death, when a Court of Equity preserves the rights of the wife, although there may be a failure of any legal remedy, to enforce them.

At law, if several persons are bound jointly and severally, and the obligee makes one of them his executor, the debt is thereby released, and the executor cannot sue the other obligor (*l*).

Again, if the obligee makes the obligor and another executors, although the obligor never administers, yet the action is gone for ever, and although the obligor dies, and makes an executor, the other co-executor of the first testator who survives, cannot have any action against the executor of the obligor (*l*).

By the nomination of the debtor to the office of executor,

(*i*) Dig. lib. 46, tit. 1, l. 71.

(*j*) Ibid.

(*k*) Cod. lib. 2, tit. 3, l. 7. Dig. lib. 18, tit. 4, l. 2, § 18, 19. Voet, ib. n. 27. Toullier, liv. 3, tit. 3, c. 5, n. 438.

(*l*) Wankford *v.* Wankford, 1 Salk. 299.

the legal remedy for the debt is not merely extinguished, but the debt itself is absolutely discharged at law. Thus, where the payee of a promissory note appointed the maker his executor, the Court of King's Bench held that the debt was gone, and that consequently no action could be maintained on the note even by a person to whom the executor had indorsed it (*m*).

The appointment of the debtor as executor being the voluntary act of the creditor, the action is for ever gone; but the effect is different where the remedy is suspended by the act of law (*n*). Thus, if administration of the effects of a creditor be committed to the debtor, this being by act of law, is only a temporary privation of the remedy (*o*).

If the executrix of the obligee marry the obligor, such marriage is no release of the debt, for the testator has done no act to discharge it (*p*): consequently, the remedy is merely suspended by the legal effect of the coverture, and on her death the administrator *de bonis non* will be equally entitled to that debt as to any others outstanding (*q*). But if the obligee makes the wife of the obligor his executrix, this will operate as a release (*r*).

But although the action is at law extinguished, yet in equity it is considered that the debt due from the debtor executor has been paid to him by himself, and upon this supposition it is an established rule in equity, that the executor is accountable for

(*m*) Freakley *v.* Fox, 9 B. & C. 130.

(*n*) Wankford *v.* Wankford, 1 Salk. 303, by Powell, J.

(*o*) Went. Off. Ex. c. 2, p. 76, 14th edit. Nedham's case, 8 Co. 268. Wankford *v.* Wankford, 1 Salk. 306, by Holt, C. J.

(*p*) Needham's case, 8 Co. 268. Co. Litt. 264, b. Wankford *v.* Wankford, 1 Salk. 306, by Holt, C. J.

(*q*) Crosman's case, 1 Leon. 320. S. C. Moore, 236. Wankford *v.* Wankford, ib. Toller, 349.

(*r*) Fryer *v.* Gildridge, Hob. 10. S. C. 1 Roll. Abr. 935, B. pl. 6, 940, M. pl. 4.

the amount of his debt as assets (*s*); and the debt is general assets not only for the payment of the testator's debts, but also of his legacies (*t*).

A trust is accordingly raised in equity not only for a residuary legatee (*u*), but even for the next of kin (*v*).

If a debtor makes his creditor, or the executor of his creditor, his executor, this alone is no extinguishment of the debt, although there be the same hand to receive and pay. Yet if the executor has assets of the debtor, it is an extinguishment, because then it is within the rule that the person who is to receive the money is the person who ought to pay it; but if he has no assets, then he is not the person who ought to pay, though he is the person who is to receive it. The debt is only extinct upon the supposition that the executor has assets which he may release to pay himself (*w*).

Therefore, if the obligor makes the obligee his executor, and he has no assets, he may sue the heir if the heir be bound (*x*).

The law is the same if one of several joint debtors makes their common creditor his executor. Therefore, if such creditor has assets, the debt is extinct, and he cannot sue the other debtor, for the having assets amounts to payment (*y*).

(*s*) Lord Tenterden, C. J., in Freakley *v.* Fox, 9 B. & C. 134.

(*t*) Flud *v.* Rumcey, Yelv. 160. Phillips *v.* Phillips, Freeman's Ch. Rep. 11. S. C. 1 Cha. Ca. 292. Anon. Freeman, ib. 52. Errington *v.* Evans, 2 Dick. 456. Carey *v.* Goodinge, 3 Bro. C. C. 111. Berry *v.* Usher, 11 Ves. 90. Simmons *v.* Gutteridge, 13 ib. 264. Bac. Abr. Exors. A. 10.

(*u*) Brown *v.* Selwyn, Cas. temp. Talb. 240. S. C. 3 Bro. P. C. 607. Toml. edit.

(*v*) Carey *v.* Goodinge, 3 Bro. C. C. 110.

(*w*) Woodward *v.* Lord Darcy, Plowd. 185. Fryer *v.* Gildridge, Hob. 10. Cock *v.* Cross, 2 Lev. 73. S. C. 3 Keb. 116. Freeman, 49, pl. 50. Wankford *v.* Wankford, 1 Salk. 305, by Holt, C. J.

(*x*) 1 Roll. Abr. 940, M. pl. 5. Pidgeon *v.* Pitts, 2 Show. 401. Wankford *v.* Wankford, by Powell, J. Co. Litt. 264, b. note by Butler.

(*y*) Wankford *v.* Wankford, 1 Salk. 305, by Holt, C. J.

Again, the same doctrine prevails where the debtor appoints his creditor to be one of several executors, if the creditor administers (*z*). But if the creditor neither proves the will nor acts as executor, he may bring an action against the other executor (*a*). Nor is it necessary to enable him so to do, that he should renounce before the ordinary (*b*). So, if the debtor make the creditor and another his executors, and the creditor does not administer, but dies, his executor may have an action against the surviving executor (*c*).

In all the States of America, except Louisiana, the doctrine of the law of England on this subject prevails.

(*z*) Woodward *v.* Darcy, Plowd. 184. Dorchester *v.* Webb, Cro. Car. 372.

(*a*) Dorchester *v.* Webb, W. Jones, 345.

(*b*) Rawlinson *v.* Shaw, 3 T. R. 557.

(*c*) Woodward *v.* Lord Darcy, Plowd. 184.

CHAPTER XII.

PRESCRIPTION.

Effect of on the obligation of the surety or principal.—The periods of time for prescribing by the Civil Law.—The law of Holland, Spain, France, Scotland.—The short periods of prescription.—The Statutes of Limitation in England.—Computation of the time.—In what cases, and against what persons they do not run.—Non valens agere.—Coverture, absence, minority.—Interruption of prescription.—Judicial, extra-judicial.—Express or implied acknowledgment of the debt after the time of prescription completed.—Payment.—By co-sureties, or co-contractors.—Statutes of Limitation in the Colonies.—Jamaica, Grenada, United States, Louisiana.

The obligation of the surety or the principal may be either extinguished or the remedy for enforcing it by the creditor may be barred by length of time or prescription.

Under the civil law and the law of Spain and France, the periods of thirty and forty years, and the third of a century under the law of Holland, constitute the prescription by which all personal actions are barred.

In the jurisprudence of Holland and Spain certain demands became prescribed after the lapse of a shorter period. Thus, an action for the fees of medical men, advocates, the wages of servants, the demands of tavern keepers, tradesmen, and the like, was barred after the lapse, in Holland of two years, and in Spain of three years, unless the creditor could produce the debtor's written acknowledgment of the demand (*a*).

(*a*) Voet, lib. 44, tit. 3, n. 7. Sande, Decis. Fris. lib. 5, tit. 6, def. 2. H. Grotius, Manud. ad. Jurisp. Holl. lib. 3, c. 46, n. 11, 12. Coren, Cons. 16, n. 33, and cons. 29. L. 15, 17, tit. 29, Part 3. L. 10, tit. 11, lib. 10, Nov. Recop. Gomez, Var. Resol. tom. 1, l. 63.

By the *coutume* of Paris, tradespeople, persons selling things by retail, such as bakers, pastry cooks, butchers, salt dealers, and the like, could not maintain an action after six months from the first delivery (*b*).

The Code Civil has adopted the like period of prescription for these demands, and for those of masters and instructors of sciences, &c., for lessons given them by the month (*c*).

The prescription of one year takes place, under the *coutume* of Paris and the Code Civil, against the demands of tradesmen who deal in articles of greater value, and those of physicians, apothecaries, and surgeons, for their fees, and of artificers, and those of schoolmasters, and other instructors of children (*e*), and for board and provisions, and for wages of servants (*f*).

Under the former law of France, which in this respect is followed by the Code Civil, the prescription against tradesmen only applies to persons in trade, and not to those out of business (*les bourgeois*) who sell the produce of their land, such as corn, wine, and wood. A person is not to be considered as a tradesman who, although actually in trade, sells the produce of his land, which is different from the article that he deals in, as, if a grocer sells the wine made in his vineyard (*g*).

These prescriptions of six months and a year, do not take place under the former or present law of France, when the claim is established by any act in writing, whether before a notary, or under private signature, or by an allowance at the foot of an account containing the charges, or in the books of the tradesman, signed by the debtor. In this case the claim is subject to the prescription of thirty years (*h*).

(*b*) Art. 126.
(*c*) Code Civil, Art. 2271.
(*e*) Ord. 1673. Cout. Paris, Art. 125, 127.
(*f*) Code Civil, Art. 2272.
(*g*) Pothier, Tr. des Oblig. n. 714. Code Civil, ib.
(*h*) Ord. 1673, Art. 9. Pothier, ib. Part 3, c. 8, n. 711. Code Civil, Art. 2274.

The prescription against the demand of tradesmen and artificers runs from the day of each article supplied, or of each piece of work being done; and a continuation of the supply, or of the work, does not interrupt it (*i*).

In the opinion of Pothier, the prescription as to servants' wages runs from the expiration of each term of his service. And this opinion is adopted by the Code Civil (*j*).

In these prescriptions, it is competent for the creditor to defer the decisory oath to the debtor, as to whether the sum demanded be really due or not. If the debtor to whom the oath is deferred, will not swear that the sum demanded from him is not due, the oath is referred back to the plaintiff, and upon such oath he obtains sentence of condemnation (*k*).

Where the widow or the heirs of the debtor are assigned, they cannot be compelled to swear whether the debt was really due from the deceased, because the oath can only be proffered to any person respecting his own act: "Qui in alterius locum succedunt, justam habent causam ignorantiæ, an id quod peteretur, deberetur. Fidejussores quoque non minus quàm hæredes justam ignorantiam possunt allegare. Hæc ita de hærede dicta sunt, si cum eo agetur, non etiam si agat; nam planè, qui agit, certus esse debet; cum sit in potestate ejus, quando velit, experiri; et ante debet rem diligenter explorare, et tunc ad agendum procedere" (*l*).

Paulus states it as a maxim, "hæredi ejus, cum quo contractum est, jusjurandum deferri non potest" (*m*).

The Code Civil allows the oath to be deferred to widows and

(*i*) Coutume of Paris, Art. 125. Pothier, ib. n. 715. Ord. 1673, Art. 9. Code Civil, ib.

(*j*) Pothier, ib. n. 717. Code Civil, ib.

(*k*) Ord. 1673, tit. 1, Art. 10. Pothier, Tr. des Oblig. n. 719, 720. Code Civil, Art. 2275.

(*l*) Dig. lib. 50, tit. 17, l. 42.

(*m*) Dig. ib. Poth. ib. n. 721.

heirs, or to the guardians of the latter, if they are minors, that they may declare whether they do not know that the thing is really due (*n*).

The creditor has not only the right of deferring the oath, notwithstanding the prescription, but he may, when the demand does not exceed one hundred livres, be received to prove by witnesses, that the defendant has offered to pay the sum due since the demand, or even at any time since the period when he alleges himself to have paid it (*o*).

The present Code de Commerce of France, has an express provision respecting the prescription of bills of exchange.

All actions relative to letters of exchange and to bills to order subscribed by tradesmen, merchants, and bankers, or for matters of commerce, prescribe themselves by five years' reckoning from the day of protest, or from the last suing out any judicial process, if there hath been no judgment, or if the debt hath not been acknowledged by any separate act.

Nevertheless, the pretended debtors shall be held, if required to affirm upon oath that they no longer owe the money, and their widows, heirs, &c. that they *bonâ fide* believe that there is nothing more due (*p*).

In Scotland, by the statute 1669, c. 9, holograph missive letters, and holograph bonds, and subscriptions in compte books, without witnesses, are prescribed, if not pursued for within twenty years, unless the pursuer offer to prove, by the defendant's oath, the verity of them (*q*).

The time runs from the date of the writing, not from the day of payment, or the purifying of a condition (*r*).

(*n*) Art. 2275.

(*o*) Poth. ib. n. 723.

(*p*) Code de Commerce, Art. 189.

(*q*) Erskine, ib. § 26. 1 Bell's Com. 329. Bank of Scotland, July 9, 1747, Lord Monboddo, 5 Brown's Sup. 748.

(*r*) Hume, Jan. 19, 1773, Dict. 10,992. 1 Hailes, 511.

After this statutory period is elapsed, the authenticity of the writing, and not merely that of the subscription, must be established by the debtor's oath, or that of his heir (*s*); and in that case, it is not necessary to prove the debt (*t*).

Bargains concerning moveables or sums of money, as sales, hirings, loans, deposits, and pledges, provable by witnesses, are only proveable by writ or oath of party, if the same be not pursued for within five years after the making of the bargain (*u*).

No bill of exchange, or inland bill, or promissory note is of force, or effectual to produce any diligence or action, unless such diligence is raised and executed, or action commenced thereon, within the space of six years from and after the term at which the sums in the said bills or notes became exigible. But after the expiration of the said six years, in either of the cases mentioned, it may be proved by the oath or writ of the debtor, that the debt contained in the bill or note is still owing (*v*).

The statute begins to run from the time at which the debt is exigible (*w*).

The effect of the limitation is, that by mere lapse of time, the instrument, as a ground of action or diligence, is extinct;

(*s*) Erskine, ib. Correct. Sir G. M'Kenzie's Obs. on the Act, 2 Parl. c. 11, sess. 1, c. 9. Earl of Leven, July 28, 1715, Dict. 10,991. Graham, July 3, 1725, Dict. 10,992. Brown, July 17, 1741, Kilk. Dict. 9417. Dalzel, Nov. 19, 1784, Dict. 10,994. 2 Hailes, 984.

(*t*) Muir, Feb. 19, 1695, 4 Brown's Sup. 269.

(*u*) 1669, c. 9. Erskine, b. 3, tit. 7, § 8, 20. White, Jan. 1683, Dict. 11,065. Ewart, June 1730, Dict. 11,067. Nobles, June 11, 1813, F. C.

(*v*) 12 Geo. 3, c. 72, made perpetual by 23 Geo. 3, c. 18, § 55. 1 Bell's Com. 393.

(*w*) Douglas, Heron and Co., Nov. 19, 1793, Dict. 4602; affirmed 6 Brown's Parl. Cases, 276. Stevenson, June 16, 1807, F. C. Dict. Bill, App. 20. 1 Bell's Com. 393. Thomson on Bills, 674.

so diligence cannot proceed on the registered protest (*x*), and the action ought to be libelled upon the debt, as established by other proofs than the bill (*y*).

The bill or note may be preserved in force by diligence, or a judicial demand (*z*).

When the six years have expired before the action has been raised, it is necessary to establish the debt by writing or oath of the debtor. Such proof, if within the six years, must amount to an acknowledgment of the debt, superseding the bill (*a*); and thus payment of interest within the six years, or of part of the sum in the bill, is not enough (*b*). If the acknowledgment refer to the bill as the document on which the debt depends, it seems not sufficient to sustain an action after the six years (*c*).

If the proof offered be subsequent to the six years, it seems sufficient that the acknowledgment refers to the bill, and recognizes the debt as subsisting (*d*).

The debt is restored, not as if the bill were re-established to run a new course of six years, but as a debt subject to the pre-

(*x*) Douglas, Heron and Co., Nov. 26, 1784, Dict. 11,127. Armstrong, May 16, 1804, Dict. 11,140.

(*y*) Campbell, May 19, 1797, Dict. 1648. Phillip, Jan. 15, 1800, Dict. Bill, App. 9. Clarkson's Trustees, June 8, 1820, F. C. Sinclair, Dec. 19, 1823, 2 S. & D. 600. Strathallan, May 29, 1828, 6 S. & D. 881. Stirling, March 4, 1830, 8 S. & D. 638.

(*z*) Gordon, June 23, 1784, Dict. 7532.

(*a*) Russell, May 23, 1792, Dict. 11,130. Bell's Cases, 125. Lindsay, May 19, 1797, Dict. 11,137. M'Tavish, Jan. 25, 1825, F. C. 3 S. & D. 472. Hunter, June 9, 1831, 9 S. & D. 703.

(*b*) Horsburgh, Feb. 13, 1811, F. C. Ferguson, March 7, 1811, F. C.

(*c*) See case of Stirling, March 4, 1830, 8 S. & D. 638.

(*d*) Russell, May 23, 1792, Dict. 11,130. Bell's cases, 125. Scott, Feb. 3, 1784, Dict. 11,126. 2 Hailes, 939. Black, Jan. 16, 1823, 2 S. & D. 118. M'Indoe, Nov. 18, 1824, 3 S. & D. 295. M'Kenzie, Feb. 15, 1827, 5 S. & D. 367. Elder, Dec. 3, 1830, 9 S. & D. 133.

scription of forty years (*e*), only as against him who recognizes the obligation (*f*).

By the act 1695, c. 5, a person binding himself, and engaging for and with another, conjointly and severally, in any bond or contract for sums of money, shall not be bound for the said sums for longer than seven years after the date of the bond, (provided certain conditions shall be observed), and that from and after the said seven years, the cautioner shall be *eo ipso* free of his caution (*g*).

As the protection of cautioners is the object of this act, he only is held a cautioner, who has total relief. Co-obligants stipulating for mutual relief are not cautioners within the meaning of the act (*h*). But total relief (as to a cautioner) is not sufficient to raise the plea under the act, unless the cautioner be "bound with and for another," or as "express cautioner" (*i*). Or if he "be bound as principal or co-principal," the bond must contain "a clause of relief," or there must be a bond of relief "apart" (*j*), intimated personally to the creditor at his receiving of the "bond" (*k*).

(*e*) Ferguson, March 7, 1811, F. C. M'Indoe, Nov. 18, 1824, 3 S. & D. 295.

(*f*) Houston, May 3, 1822, 1 S. & B. 149. M'Neil, Jan. 31, 1823, 2 S. & D. 174. M'Indoe, *ut supra*.

(*g*) Erskine, b. 3, tit. 7, § 22, 24. 1 Bell's Com. 356. See opinion of the Court in Stewart's case, Dec. 10, 1712, Dict. 11,151; 11,154.

(*h*) Ballantyne, Jan. 21, 1708, Dict. 11,010. Park's Creditors, Feb. 16, 1785, Dict. 11,031. Muir, Jan. 1728, Dict. 11,014. Smith, Nov. 22, 1821, 1 S. & D. 159, affirmed 1 Wils. & Shaw, 315.

(*i*) Ross, Dec. 11, 1729, Dict. 11,014. Scott, Feb. 8, 1715, Dict. 11,012. Douglas, Heron and Co., Nov. 20, 1792, Dict. 11,032, affirmed in House of Lords, Dict. 11,048. Yuille, Feb. 27, 1827, F. C. 6 S. & D. 137, affirmed, Sept. 15, 1831, 5 Wils. & Shaw, 436. S. C. 8 S. & D. 485.

(*j*) Ross, *ut supra*. Smith, Feb. 19, 1829, 7 S. & D. 771. Douglas, Heron and Co., *ut supra*. Burnet, June 29, 1742, Dict. 11,018. Elch. v. Caut. 13.

(*k*) Bell, Feb. 14, 1727, Dict. 11,039. M'Rankin, June 23, 1714, Dict. 11,036.

It must be an obligation for a sum of money, to be paid within the seven years (*l*). The act does not extend to cautioners *ad facta præstanda* (*m*), or judicial cautioners (*n*), or cautioners in marriage contracts (*o*), or for the discharge of an office (*p*).

The act does not extend to cautioners for relief (*q*), for a composition in bankruptcy (*r*), in bonds of corroboration (*s*), nor to a person engaging by a missive letter to procure security to the creditor, or as guarantee for debts due, or for mercantile credit (*t*).

Actions of debt for house mails, men's ordinaries, servants' fees, merchants' accounts, and others the like debts that are not founded upon written obligations, must be pursued within three years, otherwise the creditor can have no action, except he either prove by writ or by oath of the party (*u*).

This act applies to, 1st, merchants' accounts, whether in retail or in wholesale (*v*); but not the price of goods consigned

(*l*) Anderson, May 25, 1821, F. C. 1 S. & B. 28. Balvaird, Jan. 18, 1709, Dict. 11,005. Borthwick, Feb. 4, 1715, Dict. 11,008. Millers, Feb. 19, 1762, Dict. 11,027.

(*m*) Stewart, July 1726, Dict. 11,010. Robertson, Dec. 3, 1736, Dict. 11,010. Elch. Caut. 5, 6. Sir R. Monro, July 22, 1741, Kilk. Dict. 11,017. Elch. Caut. 10. Marshall, July 22, 1736, ib. 5.

(*n*) Hope, Feb. 4, 1715, Dict. 11,009. M'Kinlay, Feb. 14, 1781, 2 Hailes, 881. Hog, June 13, 1826, 4 S. & D. 702.

(*o*) Stewart, *ut supra*.

(*p*) Caves, Jan. 3, 1741, Dict. 11,020. Elchies, Caut. 12. Strang, Jan. 5. 1709, Dict. 11,005.

(*q*) Forbes, Feb. 1726, Dict. 11,014. Bruce, June 26, 1793, Dict. 11,033.

(*r*) Cuthbertson, May 23, 1823, 2 S. & D. 330.

(*s*) Rutherford, Feb. 8, 1715, Dict. 11,012. Lady H. Gordon, Nov. 16, 1748, Kilk. Dict. 11,025, Elchies.

(*t*) More, Feb. 16, 1710, Dict. 11,011. Spence, Feb. 3, 1742. Elch. v. Caut. 12. Hog and Co., July 9, 1705, Dict. 11,029.

(*u*) 1579, c. 83. Erskine, Pr. b. 3, tit. 7, § 6, and Inst. b. 3, tit. 7, § 17.

(*v*) Ord, Feb. 15, 1630, Dict. 11,083. Bruce, Feb. 11, 1670, 1 Brown's Sup. 609.

between foreign merchants (*w*); nor bargains of moveables (*x*); nor contracts for repairs (*y*); nor accounts between masters and owners of a ship (*z*). 2ndly, Workmens' wages (*a*), 3rdly, Writers' accounts (*b*), salaries to factors (*c*), claims of the clerk to a submission (*d*). But this does not apply to cash advances, though it does to the charge for commission on advances (*e*). 4thly, Aliments furnished (*f*). 5thly, Furnishings to a family or a domestic establishment (*g*). 6thly, Servants' wages (*h*). 7thly, House rents where the lease is verbal (*i*). 8thly, It is no defence against an action for money recovered *ex mandato* (*j*).

This prescription begins to run, 1st, From the day of payment of termly debts, as servants' wages. 2ndly, From the

(*w*) Hamilton and Co., Jan. 24, 1795, Dict. 11,120. M'Farlan, Jan. 17, 1827, 5 S. & D. 205.

(*x*) Baird, Feb. 1688, Dict. 11,092.

(*y*) Bell, Dec. 16, 1755, 5 Brown's Sup. 840.

(*z*) Butchart, June 13, 1781, 2 Hailes, 885.

(*a*) Bayne, Dec. 21, 1692, Dict. 11,092. Tweedie, June 8, 1694, Dict. ib.

(*b*) Dallas, Feb. 21, 1695, 4 Brown's Sup. 271. Mason, Nov. 29, 1709, Dict. 11,094. M'Adam, Dec. 22, 1780, 2 Hailes, 875. Campbell, Nov. 23, 1813, 6 Dow, 116. Wallace, March 4, 1829, 7 S. & D. 542. Smith, June 19, 1829, ib. 771.

(*c*) Smith, Dec. 3, 1714, Dict. 11,096, sed quære.

(*d*) Farquharson, July 22, 1755, Dict. 11,108.

(*e*) Scott, Feb. 24, 1832, 10 S. & D. 375. Kerr, June 15, 1827, 5 ib. 802. Drummond, Feb. 19, 1740, Dict. 5858.

(*f*) Hamilton, July 25, 1716, Dict. 11,100. Cuming, Jan. 6, 1722, ib. 11,101. Forsyth, Feb. 15, 1791. Bell's cases, 361. Finlayson, July 7, 1809, F. C. M'Dowall, Feb. 19, 1807, Pres. App. 6.

(*g*) Russell, July 23, 1610, Dict. 11,082. Guthrie, Feb. 11, 1724, Dict. 11,101.

(*h*) Act 1579, c. 83. Robertson, Dec. 10, 1749, 1 Cr. & St. 293. M'Dougal, Jan. 22, 1830, 8 S. & D. 959.

(*i*) Ferguson, Jan. 14, 1737, Dict. 11,103. Cuming, Feb. 18, 1825, 3 S. & D. 545.

(*j*) Frier, Jan. 27, 1826, 4 S. & D. 396.

close of the account; which is either the date of the last unpaid article (*k*); or of the last article preceding an interruption of three years; or the last article preceding the day of the death of the debtor (*l*). But it is a continuous account if it proceed without interruption, although each year's account should be summed up, and interest charged on it (*m*).

To rebut the presumption it is necessary to show, by written mandate, the constitution of the debt (*n*); in which case it is a debt of another class from that provided for in the act. But it is not, for this purpose, sufficient to show a written order for goods with a carrier's receipt (*o*), or a letter from a country writer employing a town agent (*p*).

In debts contemplated by the act, it is necessary after the term to prove by the writing or the oath of the debtor, or his representatives, or in a concern under the sole superintendence of a manager, by his oath, both the constitution and the subsistence of the debt (*q*).

If the original debtor had died within the three years, as there could not be any presumption of payment, proof of the

(*k*) Beck, Nov. 30, 1831, 10 S. & D. 81.

(*l*) 1 Bell's Com. 331. Graham, Feb. 26, 1670, Dict. 11,086. Ross, Feb. 12, 1680, Dict. 11,089. Wilson, July 28, 1680, Dict. 11,090. Lady Ormiston, Nov. 11, 1709, Dict. 11,093. Wright, Feb. 14, 1753, Dict. 11,106. Lesly, Nov. 15, 1808, F. C. Wilson, Feb. 7, 1826, 4 S. & D. 427.

(*m*) Whyte, Dec. 1, 1829, 8 S. & D. 154.

(*n*) Sadler, Dec. 18, 1794, Dict. 11,119. Bell's cases, 104.

(*o*) Bell. Dec. 16, 1755, 5 Brown's Sup. 840. Douglas, of same date, Dict. 11,116. Bell's cases, 97, and cases cited.

(*p*) Wallace, March 4, 1829, 7 S. & D. 542.

(*q*) Donaldson, Jan. 15, 1766, Dict. 11,110. Bryson, Nov. 16, 1825, 4 S. & D. 180. Ersk. b. 3, tit. 7, § 18; tit. 4, § 11, 13. 1 Bell's Com. 332, 334. Lesly and Wilson, *supra*. Nisbett's Trustees, Jan, 23, 1829, 7 S. & D. 307. Smith, Feb. 17, 1831, 9 S. & D. 474. Duncan, July 2, 1829, 7 S. & D. 821. Buchanan *v.* Paterson, Nov. 20, 1828, 7 S. & D. 35.

constitution of the debt, with the heir's oath negative of payment, is sufficient to support the action. If the three years had expired before the original debtor's death, the presumption of law is held to attach, and the heir's oath negative of payment does not overturn it (*r*).

Ministers' stipends and multures are prescribed after five years from the term of payment (*s*).

Rents, maills, or duties are prescribed after five years from the tenant's removing from the land (*t*), and the dependence of a sequestration for rents does not bar the prescription (*u*).

The principal general enactments by which the limitation of personal actions is established in England are, 21 Jac. 1, c. 16, ss. 3 4, 5, 6, and 7; and 4 & 5 Ann. c. 16, s. 19; and 9 Geo. 4, c. 14, ss. 1, 2, 3, 4, 8, 9, 10. The 21 Jac. 1, c. 16, s. 3, enacts, that all actions of accounts and upon the case, (other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants,) all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, actions for trespass, detinue, and replevin for goods or cattle, and all actions of trespass *quare clausum fregit*, shall be commenced within six years next after the cause of such action or suit, and not after; and all actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and actions upon the case for words within two years next after the words spoken, and not after.

The exception in the Statute of Limitations as to merchants'

(*r*) Granger's Executors, 11 S. & D. 591.

(*s*) Act 1669, c. 9. Erskine, b. 3, tit. 7, § 20, and note, p. 766, 767. Nisbet, July 10, 1729, Dict. 11,059. Fairholm, Feb. 3, 1725, Dict. 11,058.

(*t*) Murray, Dec. 9, 1709, Dict. 11,054.

(*u*) Cochrane, Jan. 15, 1830, 8 S. & D. 324.

accounts applies only to the action of account, or for not accounting, and not to the action of *indebitatus assumpsit.*

It has been decided that this exception applies only to cases where an action of account will lie, importing dealings which create a trust, and not to those where *indebitatus assumpsit* would lie on mere mutual sales, where it was sought to make mutual dealings within the exception of 9 Geo. 4, c. 14, evidence of part payment (*v*).

The act does not affect debts due on a specialty, nor secured by judgment or recognizance; and although the statute includes in its terms actions of debt for arrearages of rent, yet it does not extend to rent reserved by indenture under seal (*w*), nor to a rent-charge (*x*).

Before the statute 2 & 3 Wm. 4, c. 27, the payment or release was *presumed* after the lapse of twenty years.

It is said that to warrant such a presumption, there must be full twenty years from the time when the bond became forfeited (*y*).

But now by the 40th section of the recent statute 2 & 3 Wm. 4, c. 27, it is enacted, that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, but within twenty years next, after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest therein shall have been paid, or some acknowledgment of the right thereto, shall have been given in writing, signed by the person by

(*v*) Ingliss *v.* Haigh, 8 Mees. & Wels. 789; 7 Dow. P. C. 817.

(*w*) Freeman *v.* Stacy, Hutton, 109. Leigh *v.* Thornton, 1 Bar. & Ald. 625. 1 Saund. 38.

(*x*) Cupit *v.* Jackson, M'Clell. 495. S. C. 13 Price, 721.

(*y*) Colsell *v.* Budd, 1 Camp. 27. William *v.* Gorges, ib. 721.

whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit, or proceedings shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.

The computation of the time which constitutes the long prescription is, "de momento in momentum," "dies ultimus cæptus non habetur pro completo" (*z*). The prescription is not acquired until the last day of the time is completed.

According to some decisions in England, it has been considered that the day upon or in which the cause of action accrued is to be included in the calculation (*a*); but according to more recent decisions, it should seem that it ought in general to be excluded (*b*).

In prescriptions of a year there is most frequently added a day to the year (a year and a day), in order to avoid a question whether any part of the last day is included in the computation (*c*).

When the promise of the surety is that of indemnity, the statute begins to run as against the surety, when the party to whom the promise is given is damnified (*d*).

If a surety undertakes for the debt then due from the principal to his creditor, in consideration of the latter extending to the principal the period of two years and upwards for the payment of his debt, the surety's liability accrues, when the

(*z*) Matth. Parœm. Belg. 9, n. 5. Voet, lib. 44, tit. 3, n. 1. Ersk. b. 3, tit. 7, § 30.

(*a*) Rex *v.* Arundel, Hob. 109. Clarke *v.* Davey, 4 Moore, 465. 2 Bl. Com. 141, n. Lloyd *v.* Wigney, 6 Bing. 489. 1 Burn's J. 805, 806.

(*b*) Lester *v.* Garland, 15 Ves. 248. Pellew *v.* Inhabitants of Wonford, 9 Bar. & Cres. 134. Hardy *v.* Ryle, ib. 603. Higgins *v.* M'Adam, 3 Young & Jer. 1, 16. 1 Man. & Ry. 300, n. b. Pellew *v.* East Wonford, 4 Man. & Ry. 130.

(*c*) Groeneweg. ad. Inst. lib. 4, tit. 12. Voet, lib. 44, tit. 3, n. 4.

(*d*) Huntley *v.* Saunderson, 1 Cr. & Mees. 467.

principal makes default after two years and upwards, and in case the surety's promise is by a writing not under seal, and the action be not brought against the surety within six years from the expiration of the two years, the latter may claim the benefit of the statute (*e*). If a surety undertake for the debt of his principal, upon condition that no application shall be made to him, till after failure of the creditor's utmost efforts to obtain the same from the principal, such a condition will not give the creditor the power by his own laches, in not proceeding against the principal to keep alive the surety's liability; and the Statute of Limitations will, notwithstanding such a condition, begin to run from the time when the legal proceedings might have been instituted against the principal (*f*).

Upon an undertaking to indemnify the plaintiff against a distress, and all costs of any action, &c., by replevying the same; it was held, that the injury to which the indemnity applied arose at the time of the plaintiff paying the costs of such suit, and not of the delivery of the bill of costs, and that the statute did not begin to run until after such payment (*g*).

On the issue, in assumpsit against the drawer of a bill on the Statute of Limitations, the plaintiff showed an agreement whereby, in consideration of the forbearing to sue, the defendant undertook to debar himself of the benefit of the statute, and also to pay whenever of ability. It was proved that the defendant, having succeeded to a peerage, became of ability in 1825, above ten years before the action brought; it was held, that on his becoming of ability, there was a complete right of action, and that the bringing of the action was a sufficient demand, and that the period of the revival of the right of action, was that of

(*e*) Holl *v.* Hadley, 2 Ad. & Ell. 758.

(*f*) Ibid. *supra.*

(*g*) Collings *v.* Heywood, 1 Perr. & D. (Q. B.) 502, and 10 Ad. & Ell. 633.

the fact of the ability taking place, and not of the plaintiff becoming acquainted with it (*h*).

It is a general maxim that prescription does not run against a person who is not entitled, or not enabled to sue for his demand, "contra non valentem agere non currit præscriptio" (*i*). It cannot run therefore where a debt is payable on a condition, or on a future day, until the condition takes effect, or the day for payment has arrived.

It does not run against a married woman in respect of any demand which she may have against her husband, or against a third person, if the latter, in case that demand was established, would have a right of action against the husband (*j*).

Coverture also is an exception under the English Statutes of Limitations.

It does not run against creditors during the period allowed to the heir for making an inventory (*k*); nor against the heir who has entered with benefit of inventory, in respect of any demand which he may have against the succession (*l*).

The Code Civil adopts the latter rule.

According to the former and present law of France, the prescription runs against a vacant succession, although there be no curator of it, during the three months for making the inventory, and the forty days for deliberating (*m*).

(*h*) Waters *v.* Thanet, 4 Gale & D. (Q. B.) 166.

(*i*) Cod. lib. 7, tit. 39, l. 3.

(*j*) Voet, lib. 23, tit. 5, n. 8, and lib. 44, tit. 3, n. 11. Zyp. Not. Belg. lib. 5. Wesel, de Connub. Soc. Tr. 2, c. 1, n. 72. Pothier, Tr. des Oblig. n. 681. Code Civil, Art. 2254, 2255. Mackie *v.* Stewart, July 1665, Dict. 11,204. Gaw, June 22, 1675, Dict. 11,183. Taylor, Nov. 16, 1675, Dict. 6055.

(*k*) Cod. lib. 6, tit. 30, l. 22, § 11. Voet, lib. 44, tit. 3, n. 11. Pothier ib. n. 681.

(*l*) Pothier, ib. 681.

(*m*) Pothier, ib. Code Civil, Art. 2258, 2259.

It has been decided that the *annus deliberandi* of the debtor's heir does not stop the Scotch triennial prescription (*n*).

The prescription does not run against a person taking under a *fidei-commissum* subject to a preceding estate, during the continuance of that estate (*o*): nor against a fiar excluded by a liferenter (*p*).

An instance under the law of England of the Statute of Limitations not running because no suit could be instituted, is that of a payee of a bill being dead at the time it fell due. In that case it was held, that the statute did not begin to run until letters of administration had been obtained by some one (*q*). So where the testator resided and died abroad, it was held that his executor in England might be sued within six years after his taking out probate (*r*).

If the Statute of Limitations once begin to run, it continues to do so, and if the cause of action were complete in a testator's lifetime, then the statute begins and continues to run from that time, and not from his death, nor from the time of obtaining the probate (*s*).

A devise in trust for payment of debts, does not revive a debt upon which the Statute of Limitations had taken effect by the expiration of the time before the testator's death (*t*).

A direction for the payment of debts in a will of personal estate will not stop the running of the statute (*u*).

(*n*) Duke of Argyle *v.* Campbell, July 27, 1736, Elch. Prescription, No. 10.

(*o*) Cod. lib. 6, tit. 43, l. 3, § 3.

(*p*) Elliott, Feb. 18, 1724, Dict. 11,209. Brown, Feb. 5, 1680, Dict. 11,028. Scott, Dec. 21, 1756, 5 Brown's Sup. 854. M'Ghie, Dec. 17, 1776, Dict. 11,112. Lawrie, Dec. 7, 1830, 9 S. & D. 147.

(*q*) Douglas *v.* Forrest, 4 Bing. 686.

(*r*) Murray *v.* E. I. Company, 5 Bar. & Ald. 212.

(*s*) Hickman *v.* Walker, Willes, 27.

(*t*) Burke *v.* Jones, 2 Ves. & B. 275. Scoll *v.* Jones, D. P. 4 Cl. & Fin. 382.

(*u*) Freake *v.* Craufeldt, 3 Mylne & C. 499, 4 Jur. 1080.

A testator directed his debts to be paid out of his real and personal estate: and he afterwards provided, that if his personal estate should fall short in paying his debts, then he empowered his executors to enter into the receipt of the rents of his freehold until the same should be wholly paid off.

The personal estate was sufficient for payment of the debts: it was held, that nevertheless a trust had been created for payment of the debts out of the realty so as to prevent the operation of the statute; and that the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate (*v*).

If there be a known executor *de son tort*, he must be sued within six years, though there be no rightful executor (*w*).

The absence of the creditor or debtor did not under the civil law, or the jurisprudence founded on it, prevent the running of the prescription, unless it was an absence in the civil or military service of the state, or *fortuito casu*, or accompanied with imprisonment (*x*).

Pothier considers, that when a person is absent in a very distant country, for instance, in the East Indies, and the agent who had a procuration from him in his own country is dead, so that there is nobody to take charge of his affairs, the prescription nevertheless takes place. He does not fall within the rule, *contra non valentem*, *&c.*, for however distant he is, he may receive intelligence from his own country, and transmit another procuration. But there may be circumstances under which it is not possible to do so, and when these are fully made out he may have the benefit of the rule (*y*).

(*v*) Crallen *v.* Oulton, 3 Beav. 1.

(*w*) Webster *v.* Webster, 10 Ves. 93.

(*x*) Cod. lib. 7, tit. 35, l. 2, 4, 6, 8. Grot. Manud. ad Jurisp. Holl. lib. 2, c. 7. Matth. Parœm. 9, n. 22, 23. Voet, lib. 44, tit. 3, n. 9.

(*y*) Pothier, Tr. des Oblig. n. 684.

Absence does not furnish an exception under the Code Civil.

Imprisonment abroad bars the prescription by the law of Scotland (*z*). In the triennial prescription there is no deduction for absence from the kingdom (*a*).

Absence or imprisonment beyond sea of the creditor or debtor, prevents the operation of the English Statute of Limitations (*b*).

It is no answer to this exception that either the plaintiff or defendant was resident in a country where the same Statute of Limitations prevailed, which was adopted in *loco fori* (*c*). Thus, the English Statutes of Limitations, 21 Jac. 1, c. 16, and 4 & 5 Ann. c. 15, s. 19, are part of the law of Jamaica. It was held by the Supreme Court in Jamaica, that a rejoinder insisting on the residence of the plaintiff and defendant in England within the last six years, where those statutes existed, was an answer to the replication insisting on absence from Jamaica. But upon a petition to her Majesty in Council, the Judicial Committee held that the rejoinder was insufficient (*d*).

If a foreigner or other person have never been in England, the Statute of Limitations never commences to operate (*e*), and, therefore, a foreign sovereign who has never been in England has a right, even after the lapse of twenty-three years, to come in and prove by his ambassador a debt against the

(*z*) Duke of Lauderdale, Jan. 25, 1678, Dict. 11,193. O'Neal, Nov. 23, 1803, Dict. 11,201. Robertson, July 7, 1758, 5 Brown's Sup. 357. Campbell, Dec. 19, 1765, ib. 915, 926. Brodie, Feb. 20, 1821, F. C. Wemys, Dec. 19, 1766, 5 Brown's Sup. 933.

(*a*) M'Ghie, Dec. 17, 1776, Dict. 11,112.

(*b*) Fladong *v.* Winter, 19 Ves. 200. 4 & 5 Ann. c. 16. Greig *v.* Somerville, 1 Russ. & M. 338.

(*c*) Stultz *v.* Wallace, from Jamaica, before the Privy Council. Bulger *v.* Roche, 11 Pick. Mass. R. 36.

(*d*) Stultz *v.* Wallace, ib.

(*e*) Sturt *v.* Mellish, 2 Atk. 612. Strithorst *v.* Græme, 2 Bl. R. 725, S. C. 3 Wils. 143. Greig *v.* Somerville, 1 Russ. & M. 338.

estate of an intestate, part of which still remains in Court in consequence of the infancy of the party entitled to it (*f*), and this, notwithstanding successive advertisements and decrees in an amicable suit (*g*); but after such delay, the fund remaining in Court was in equity only liable to bear a relative proportion of the claim (*h*).

Persons labouring under furiosity, or, in the language of the law of England, *non compotes mentis*, are also excepted from the prescription and Statute of Limitations.

Prescription did not by the civil law, or in the jurisprudence of Holland and Spain, run against minors (*i*).

Under the *coutume* of Paris and Code Civil, the prescription of thirty years does not run against minors, but they are barred by the shorter prescriptions (*j*).

By the law of Scotland, the years of minority are deducted from the term of the long prescription (*k*). The triennial prescription runs against minors (*l*); but the vicennial prescription does not run against them (*m*).

Infancy is excepted from the operation of the English Statutes of Limitation.

The prescription may be interrupted either judicially or

(*f*) Greig *v.* Somerville, 1 Russ. & M. 338.

(*g*) Ibid. Lashley *v.* Hogg, 11 Ves. 602. Angell *v.* Haddon, 1 Madd. 529.

(*h*) Ibid.

(*i*) Cod. lib. 7, tit. 35, l. 3. Voet, lib. 4, tit. 4, n. 29. Grot. Manud. ad Jurisp. Holl. lib. 2, c. 7; lib. 3, c. 46, n. 9, 10. Matth. Paræm. paræm. 9, n. 22, 23. L. 5, tit. 8, lib. 11, Nov. Rec.

(*j*) Coutume of Paris, Art. 114. Pothier, Tr. des Oblig. n. 682, 718. 1 Dupless. 494. Code Civil, Art. 2252, 2278.

(*k*) Act 1617, c. 12. Ersk. b. 3, tit. 7, § 35. Earl of Marchmont, Feb. 23, 1714, Dict. 11,154. Dalrymple, 1737, Elch. Pres. 14. Blair, July 1741, ib. 8. Ruddiman, June 25, 1746, ib. 28, Dict. 11,155. Inveraw, Jan. 20, 1747, Dict. 11,156. Cuming, Dec. 8, 1790, Dict. 11,170. Campbell, Dec. 19, 1765, 5 Bro. Sup. 917. Bell's Princ. 161.

(*l*) Act 1669, c. 9.

(*m*) Brown, Jan. 26, 1709, Dict. 11,150. 5 Brown's Sup. 915.

extrajudicially. If interrupted, the running of the time is not merely suspended but broken off, so that it becomes necessary to begin a new course of prescription.

Under the civil law, and the jurisprudence of Holland, Spain, and France, judicial interruption was effected by the commencement of an action for the demand (*n*).

It is requisite, however, that the judicial process should be accompanied by the formalities which would render it valid (*o*).

So in the law of Scotland, the interruption is not competently made, unless the debtor is lawfully cited (*p*) specially to pay the debt in question (*q*).

The action must be called in Court. A mere citation is only a temporary interruption requiring to be renewed every seven years (*r*).

The action must proceed upon a legal title to the debt; or, at least, there must be in the pursuer a radical title capable of being completed (*s*).

It is not strictly necessary that a special action should be raised for the debt. It is sufficient to enter a claim in a proper process of competition; as ranking and sale, multiplepoinding, or sequestration (*t*). Even a claim lodged in a

(*n*) Cod. lib. 7, tit. 33, l. 2; tit. 40, l. 3. Voet, lib. 5, tit. 1, n. 149; lib. 41, tit. 3, n. 20. L. 5, tit. 8, lib. 11, Nov. Rec. L. 21, tit. 29, Part 3. Pothier, Tr. des Oblig. n. 697. Code Civil, Art. 2244, *et seq.*

(*o*) Ibid.

(*p*) Campbell, Jan. 18, 1799, Dict. 11,120. Baillie, March 2, 1790, Dict. 11,286.

(*q*) Garden's case, Nov. 26, 1743, Dict. 11,274. Ersk. b. 3, tit. 7, § 38. M'Dowal, Nov. 30, 1739, Elch. Pres. 19. Menzies, Feb. 16, 1699, Dict. 11,258. Vans, June 14, 1816, F. C.

(*r*) Act 1669, c. 10. Camerons, July 30, 1761, Dict. 11,331.

(*s*) Blair, Dec. 9, 1735, Dict. 11,270, Elch. Pres. 7. Robertson, July 5, 1776, Dict. Pres. 2. 2 Hailes, 707. Earl of Home, Aug. 1, 1764, Dict. 5555.

(*t*) Crawford, July 20, 1732, Dict. 11,049. Thomson, July 28, 1774,

process as a counter demand, and in defence, has been held an interruption (*u*).

But neither a claim lodged with a trustee under a private trust, nor the production of a claim in a process of cognition and sale by tutors (*v*), nor a claim of retention made judicially by a law agent without producing his account (*w*), has been held sufficient to interrupt prescription; and it has been also held, that where, in an action of relief against the co-obligant, the creditor was examined, and produced his ground of debt in the action, this was no interruption (*x*).

In interruption by diligence, it is not enough to register the obligation and extract a decree of registration; or even to raise horning, without giving a charge; or poinding, without following it up by execution (*y*). Informal diligence will not interrupt (*z*).

By the law of England, the process to save the statute must be the proper basis of the subsequent proceedings, and the form of action must be described therein, as the plaintiff would afterwards declare. If the proceeding is by writ of summons, the plaintiff or his attorney must return it *non est inventus*, and enter the same of record within one calendar month after the execution, or four months from the *teste*. Every continued

ib. 2 Hailes, 591. Douglas, Heron and Co., Nov. 26, 1784, Dict. 11,127. Graham, May 30, 1811, F. C. Menzies, Feb. 16, 1699, Dict. 11,258. 54 Geo. 3, c. 137, § 52. Crawford, May 25, 1827, 5 S. & D. 705.

(*u*) Sloan, June 1, 1827, 5 S. & D. 742.

(*v*) Ferrier, July 9, 1811, F. C.

(*w*) Executors of Couper, Nov. 26, 1753, Dict. 11,107.

(*x*) Viscount Arbuthnot, March 3, 1795, Dict. 11,133.

(*y*) Johnson, Jan. 11, 1672, Dict. 11,237. Thomson, Dict. General Charge, 11,264. Wright, Dec. 11, 1717, Dict. 11,268. M'Nicol, Nov. 29, 1821, 1 S. & B. 175. Lauder, Nov. 27, 1630, Dict. 10,655. Douglas, Heron and Co., Nov. 26, 1784, Dict. 11,127.

(*z*) Cameron, July 30, 1761, Dict. 11,331. Earl of Hopetoun, July 21, 1784, Dict. 11,285. Grant, July 21, 1784, Dict. 11,283.

process to save the Statute of Limitations must have a memorandum endorsed and subscribed, specifying the date of the first writ, for otherwise, by the express terms of the 2 Wm. 4, c. 39, s. 10, no such first writ will be available to prevent the operation of any Statute of Limitations (*z*).

Extrajudicial interruption is effected by an act whereby the debtor acknowledges the debt (*a*). It is not necessary that the creditor should be a party to such act. Thus if, in the inventory of the effects of the debtor, the debt is included, amongst the charges, *parmi le passif*, such inventory, though not made with the concurrence of the creditor, is an act which recognises the debt, and interrupts the prescription (*b*).

As against the debtor an acknowledgment *sous signature privée* will be sufficient; but as against a third person, who is interested in having the debt prescribed, the act would not be effectual according to the law if it is only under private signature, unless it has acquired a date anterior to the accomplishment of the prescription, and which is authenticated either by a register (*le contrôle,*) or by the decease of some of the persons who have subscribed it; for otherwise these acts under private signature have no date as against third persons, except from the time of their being exhibited (*c*).

A verbal acknowledgment of the debt, when it exceeded one hundred livres, under the former law, and one hundred and fifty francs under the present law, would not be admitted, unless there existed a commencement of proof by writing (*d*).

There may be an implied acknowledgment, as by the payment of part of the demand: "Quoties actus *tacitam aut*

(*z*) 3 Chitty's Prac. 408.
(*a*) Cod. lib. 7, tit. 39, l. 3, 7. Perez. ad Cod. lib. 7, tit. 39, n. 14.
(*b*) Pothier, Tr. des Oblig. n. 693.
(*c*) Pothier, ib. n. 694. Code Civil, Art. 1328.
(*d*) Ord. 1667. Code Civil, Art. 1341.

expressam vel præsumptam juris alieni vel debiti confessionem implicat, toties fit interruptio civilis" (*e*).

This doctrine is recognised by the Code Civil (*f*).

Amongst the modes by which interruption takes place in the law of Scotland may be mentioned, giving a new voucher, document, or acknowledgment of the debt, as showing it not merely to be subsisting, but insisted on (*g*): such is a bond of corroboration (*h*); an engagement to pay interest (*i*).

Implied interruption is by partial payment, or by payment of interest, evincing that the debt is neither paid nor abandoned. But indefinite payment secretly ascribed by the creditor to the debt will not interrupt.

A series of decisions in England had allowed the operation of the Statute of Limitations to be prevented by verbal acknowledgments of so very vague and equivocal a character, that it became necessary for the Legislature to interpose.

By the 9 Geo. 4, c. 14, it is enacted, that no acknowledgment or promise by words only shall be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Statute of Limitations, or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing, to be signed by the party chargeable thereby.

The first clause of this statute has a retrospective operation, and applies to a parol acknowledgment made before the provisions of the statute came into effect, although the acknow-

(*e*) D'Argentre, sur l'Art. 166, Coutume de Bretagne. Merlin, Interrupt. de Prescript. 491.

(*f*) Art. 2248.

(*g*) Pitmedden, July 4, 1705, Dict. 11,261. Haleyburton, Feb. 6, 1736, Dict. 11,015, Elch. Pres. 8. Aitkin, Nov. 19, 1766, 1 Hailes, 148. M'Tavish, Jan. 25, 1825, 3 S. & D. 472.

(*h*) Halyburton, *ut supra*.

(*i*) Skene, Feb. 1686, Dict. 11,256.

ledgment made before the passing of the account, and the cause was at issue at the time (*j*).

The statute does not alter the law as to the nature of the promise but substitutes a different mode of proof (*k*).

A signature by an agent it is said is not sufficient (*l*).

The written acknowledgment must contain so explicit an admission of a continuing debt, as to afford a just inference of a promise to pay (*m*): and if qualified or conditional, the event on which the payment was to be made must be shown to have happened, as when the promise was to pay when able, in which case the ability to pay must be averred and proved (*n*).

A promise in writing to pay the balance due, without, naming any sum, is sufficient under this act to take the case out of the statute, though if the only evidence be the writing, and proof of the original cause of action, without shewing what was due, the plaintiff can only recover nominal damages (*o*).

The act does not alter, or take away, or lessen the effect of payment of any principal or interest made by any person whatsoever.

A payment of interest within six years by one of the makers of a joint and several promissory note more than six years old, will take the case out of the Statute of Limitations, as against the other maker of the note, and the stat. 9 Geo. 4, c. 14, has not altered the law in this respect. And if this interest was one of the items in an account of which the party paid the balance, that is a sufficient payment of interest (*p*).

(*j*) Towlen *v.* Chatterton, 3 M. & P. 619; 6 Bing. 258. S. P. Ansell *v.* Ansell, 3 Car. & P. 560. Amner *v.* Cattle, 2 M. & P. 367; Hilliard & Leesnard, M. & M. 297.

(*k*) Haydon *v.* Williams, 7 Bingh. 163.

(*l*) Whippy *v.* Hilary, 3 Bar. & Adol. 399. 1 Chitty's Pract. 763.

(*m*) Per Lord Tenterden, Tanner *v.* Smart, 6 B. & C. 603.

(*n*) Ibid. Laing *v.* M'Kenzie, 4 Car. & P. 463. Scales *v.* Jacobs, 3 Bing. 638.

(*o*) Dickinson *v.* Hatfield, 2 Mood. & M. 141. S. C. 5 Car. & P. 46.

(*p*) Whitcomb *v.* Whiting, 2 Dougl. 652. Burleigh *v.* Stott, 8 B. & C.

If A. gives as security a note of himself and B., a payment on behalf of B., after the Statute of Limitations has begun to run, revives the debt as against A. (*q*).

In an action upon a joint and several promissory note, evidence of one maker having drawn another promissory note for payment of interest due upon the first debt, will take the case out of the Statute of Limitations as against the other (*r*).

A payment of interest by A. on the joint and several note of A. and B. is evidence of a promise by B., and takes the note out of the Statute of Limitations, though B. was a mere surety, and the payment was made without his knowledge (*s*).

But if the joint contract is severed by the death of A., a payment by his representative, will not take debt out of the statute as against the survivor, but the first mentioned statute will begin to run as against the surety from the time, when the joint liability ceased (*t*). So if the note is the joint and several promissory note of A. and B., and B. dies in the lifetime of A., a payment by A. will not take the debt out of the Statute as against B.'s representative (*u*), nor if B. die in the lifetime of A. will any payment by B.'s representative take the debt out of the operation of the statute as against the surviving maker (*v*).

A promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt more than six years old, is a sufficient compliance with the provisions of the 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations,

36. Chippendale *v.* Thurston, 4 Car. & P. 98; M. & M. 411. Pease *v.* Hirst, 10 B. & C. 122; 5 M. & R. 88. Channel *v.* Ditchbourn, 15 Mees. & Wels. 494.

(*q*) Ex parte Woodman *v.* Turner, 3 Mont. & Ayrt. 609, but see ib. 615.

(*r*) Reed *v.* Wrout, 4 Jur. 577, Q. B.

(*s*) Burleigh *v.* Stott, 2 M. & R. 93; 8 B. & C. 36.

(*t*) Slater *v.* Lawson, 1 B. & Ad. 396.

(*u*) See Atkins *v.* Tredgold, 2 B. & C. 23.

(*v*) Slater *v.* Lawson, *supra*.

though no amount is specified in the promise; and a plaintiff suing on such promise is not confined to nominal damages, but may recover the whole of such proportion upon proving the amount by extrinsic evidence (*w*).

A. and B. were jointly indebted to C.; after more than six years had elapsed since the debt accrued, A. promised in a writing signed by him to pay his proportion when applied to. Afterwards C. sued A. and B. jointly in *indebitatus assumpsit*, on the original joint cause of action. B. pleaded the general issue, and A. pleaded the general issue and the Statute of Limitations, and judgment was entered for C. against B., and for A. against C. C. afterwards brought a fresh action against A. and declared specially on the new promise to pay his proportion. Held, that neither the recovery against B. nor the verdict and judgment for A. was any answer to the action against A. on the new promise (*x*).

No indorsement or memorandum of any payment written or made after the time appointed for the act to take effect upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as take the case out of the operation of the Statutes of Limitation (*y*).

The act, as well as the previous Statutes of Limitation, are to be deemed to apply to the case of any debt on simple contract alleged by way of set off on the part of any defendant, either by plea, notice or otherwise (*z*).

It is sufficient that there be an interruption, or acknowledgment in one and the same contract. If, therefore, the creditor had sued one of three sureties, and after the lapse of thirty years

(*w*) Leckmere *v.* Fletcher, 1 C. & M. 623; 3 Tyr. 450.
(*x*) Ibid.
(*y*) 9 Geo. 4, c. 14, s. 3.
(*z*) Sect. 4. 21 Jac. 1, c. 16, s. 3. Remmington *v.* Stevens, 2 Str. 1271. Bul. N. P. 180.

sued the other two, they could not avail themselves of the prescription, because that had been interrupted by the suit against the first (*z*).

An interruption to one of the several debtors *in solido*, is an interruption against the others, and their heirs (*a*).

It is otherwise with respect to several heirs of the same debtor; an acknowledgment by one, or an interpellation by one, only interrupts the time of prescription with respect to the part for which he is personally the debtor, and does not prevent the prescription of the part due from the other, who has neither acknowledged the debt, nor received any judicial interpellation (*a*).

In like manner, the judicial interpellation of the heir of one of the debtors *in solido*, interrupts the prescription against all the other debtors (*b*).

But the interpellation of one of the heirs of one of the debtors *in solido*, of a divisible debt, only interrupts the prescription against the other debtors, so far as that heir is liable for the debt (*c*).

In England, by the act of 9 Geo. 4, c. 14, it is enacted, "that when there are two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the Statutes of Limitation, so as to be chargeable in respect, or by reason only of any written acknowledgment or promise made and signed by any other or others of them.

"In actions commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at

(*z*) Hering. de Fidejuss. c. 20, § 18.

(*a*) Cod. lib. 8, tit. 40, l. 5. Voet, lib. 45, tit. 2, n. 6. Perez. ad Cod. lib. 8, tit. 40, n. 18. Pothier, Tr. des Oblig. n. 272. Clerk, Jan. 27, 1747, Dict. 10,662. Gordon, June 23, 1784, Dict. 7532, 2 Hailes, 947.

(*b*) Pothier, Tr. des Oblig. n. 698.

(*c*) Ibid.

the trial or otherwise, that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, and judgment may be given, or costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

There is a great difference in the civil law and the jurisprudence founded on it, whether the acknowledgment of the debt by the debtor is made before or after the time when the prescription is accomplished. In the former case, its only effect is that of interrupting the prescription, and such acknowledgment might be made not only by the debtor himself, but also by a tutor, curator, or person having a general procuration, and even by the minor himself.

But if the acknowledgment be made after the time of prescription is accomplished, and the debt be revived, it can only be made by the debtor himself, who must be of full age. It cannot be made by a tutor, a curator, or a person having a general procuration for the particular purpose. The reason assigned is, that an acknowledgment made after the prescription is accomplished for the purpose of destroying it, involves a gratuitous alienation of the *fin de non recevoir*, acquired by the completion of the time, and the gratuitous alienation of a right exceeds the authority of a tutor, curator, or person acting under a general power (*d*).

Although, by the law of England, the minority of the debtor would prevent his acknowledgment from reviving the debt if his infancy were insisted on, yet an executor is not bound to

(*d*) Pothier, ib.

plead the Statute of Limitations to an action brought by the creditor of his testator (*e*).

Nor is it any breach of his duty that he acknowledges a debt which he knows to be due by his testator (*e*).

The English Statutes of Limitation were adopted in all the colonies except those in which the law of Holland, Spain and France prevails.

In Jamaica, the act 9 Geo. 4, c. 14, has been enacted by an act of its Legislature (*f*), but it has been not adopted in the other colonies. Besides the English Statutes of Limitation, there is an act of the Jamaica Legislature, which has also been enacted by the Greneda Legislature, whereby all bills, bonds, and mortgages, whereon no interest hath been paid, and judgments, recognizances, fines, and amerciaments, and all and every other writing and writings, obligatory whatsoever, which have not been legally demanded within the space of twenty years, since the dates thereof respectively, or since the last payment of interest upon such bills, bonds, and mortgages, are declared to be null and void to all intents, constructions, and purposes whatsoever (*g*).

The English Statutes of Limitation, prior to that of the 9 Geo. 4, are generally adopted in the several States of America, except Louisiana. The code of the latter State adopts generally the provisions of the Code Civil; but actions on bills of exchange are prescribed by five years. Certain demands are prescribed by one year, and others by three years. In general, all other personal actions are prescribed by ten years, if the creditor be present, and by twenty years if he be absent (*h*).

(*e*) Norton *v.* Frecker, 1 Atk. 526. Castleton *v.* Fanshaw, Prec. Ch. 100. Expt. Dewdney, 15 Ves. 498.

(*f*) Jamaica Act, 9 Geo. 4, c. 20.

(*g*) Jamaica Act, 29 Geo. 3, c. 3. Grenada Act, March 4, 1819, n. 144, § 3.

(*h*) Louisiana Code, Art. 3508.

CHAPTER XIII.

BANKRUPTCY AND INSOLVENCY.

The *cessio bonorum* did not extinguish the debt, but the debtor obtained an exemption from arrest.—This privilege, personal to himself, did not affect the surety.—Under those systems, which extinguish the debt, the certificate of the principal does not discharge the surety, nor that of a surety discharge his co-sureties.

THE effect of the bankruptcy or insolvency of the debtor may, under some systems of jurisprudence, discharge the obligation which he had contracted, and release him from all liability. But even under those systems the original obligation still remains in force against the surety. So, also, the obligation of the surety who is become bankrupt may be discharged, but it still subsists against his co-sureties.

Under the civil law, the *cessio bonorum* of the debtor operated only as a discharge of his person, but not as an extinction of the debt, for it remained still subsisting to the extent to which the property ceded was insufficient to discharge it. "Qui bonis cesserint nisi solidum creditor reciperit, non sunt liberati. In eo enim tantummodo hoc beneficium eis produit, ne judicati detrahantur in carcerum" (*a*).

Such also was the operation of the *cessio bonorum* in Holland. Huber says, the *cessio bonorum* did not even exempt from imprisonment, unless with the consent of the creditors (*b*); "Secundum jus nostrum cessio bonorum, invitis creditoribus

(*a*) Cod. lib. 7, tit. 7, l. 4. Dig. lib. 42, tit. 3.

(*b*) Grot. Holl. Jurisc. l. 3, p. 133. Lauterb. ad Coll. Pand. lib. 42, tit. 3, § 4.

debitorem a carcere publico non liberat" (*c*). Heineccius represents it to have the same effect in some parts of Germany.

The *cessio bonorum* has the same limited effect in the law of Scotland (*d*), although in a mercantile bankruptcy, under a sequestration, a discharge from the debts may be obtained (*e*).

Under the Code Commercial of France, and in the other States of Europe, in a mercantile bankruptcy, the bankrupt can obtain the discharge from his debts.

The constitution of the United States prohibits any State from passing laws impairing the obligation of contracts (*f*), and it has been decided, that a discharge under the Insolvent laws of the State where the contract was made, will not operate as a discharge of that contract, unless it was made between citizens of the same State. It does not, therefore, discharge a contract made with the citizen of another State (*ff*).

There are Insolvent laws throughout the Union, varying in the degree of relief afforded to the debtor, but leaving his future property subject to his debts. In the States of Maine, New Hampshire, Virginia, and Kentucky, they are confined to the relief of debtors charged in execution. In New Jersey, Delaware, Maryland, Tennessee, North and South Carolina,

(*c*) Voet. lib. 42, tit. 3, § 8. Huber. tom. 3, lib. 42, tit. 3, § 1, 3 note. See M'Menomy *v.* Murray, 3 Johns. Ch. R. 442. Le Roy *v.* Crowninshield, 2 Mason R. 160.

(*d*) 2 Bell's Com. c. 5, p. 563. Ibid. p. 580.

(*e*) 2 & 3 Vict. c. 61, s. 113.

(*f*) Jappan *v.* Poor, 15 Mass. R. 419. Morris *v.* Eves, 11 Martin's Rep. 730. Judd *v.* Porter, 7 Greenleaf's Rep. 337. Hinckley *v.* Moreau, 3 Mason's Rep. 88. Titus *v.* Hobart, 5 Mason's Rep. 378; 1 Kent. Com. Lect. 19, pp. 420, 422; 2 Bell. Com. pp. 562, 567, 694. Id. pp. 580, 598. Mason *v.* Haile, 12 Wheat. Rep. 370; 2 Kent. Comm. Lect. 37, pp. 394-401. White *v.* Canfield, 7 Johns. Rep. 117. James *v.* Allen, 1 Dall. Rep. 188. Quin *v.* O'Keefe, 2 H. Bl. 553. Le Roy *v.* Crowninshield, 2 Mason's Rep. 160. Wright *v.* Paton, 10 Johns. Rep. 300. Peck *v.* Hoyier, 14 Johns. Rep. 346. Walsh *v.* Nourse, 5 Binn. Rep. 381, p. 493.

(*ff*) Ibid.

Georgia, Alabama, Mississippi, and Illinois, the Insolvent laws extend to debtors in prison on mesne or final process. In Massachusetts, New York, Connecticut, Rhode Island, Pennsylvania, Ohio, Indiana, Missouri, and Louisiana, they are still more extensive, and reach the debtor whether in or out of prison.

The statutes of Connecticut, Ohio, New Jersey, Pennsylvania, Illinois, Georgia, and Missouri for the relief of Insolvent debtors, only discharge and exempt the person of the debtor from imprisonment (*g*).

This is understood to be the limitation of Insolvent laws in the greater number of the States. The new Insolvent law of Massachusetts which was passed in 1838, granted a complete discharge to debtors, whether in or out of prison, who comply with its provisions. It applies, of course, only to contracts made subsequent to its passing. In the New York Statute, the discharge likewise exonerates the insolvent from future arrest and imprisonment upon all debts existing prior to the assignment (*h*).

The discharge only protects the person from imprisonment, and does not protect the future acquisitions and property of the debtor; but enables the creditor to reach such property, whether in the funds, or existing as choses in action, or held in trust.

The learned Commentator on the Partidas (*i*), as cited in a note to the Institutes of the Civil Law of Spain, by Aso and Manuel (*j*), says, that the future acquirements of the

(*g*) Statutes of Connecticut, 138, p. 270. Statutes of Ohio, 1831. Statutes of Illinois, R. S. of Missouri, 1835. Dig. of Statutes of Georgia, 2nd ed. 1837, p. 287, 293. Purdon's Dig. of Pennsylv. Laws, 514. Elmer's Dig. 255.

(*h*) N. Y. Revised Statutes, vol. 2, p. 15, 23.

(*i*) Greg. Lopez. Gloss. 3.

(*j*) B. 2, tit. 11, c. 3, s. 2, n. 49.

debtor would not be liable, under the *cessio bonorum*, in the case of a compulsory cession; and, in any case, sufficient must be left for the debtor to live upon, *ne egeat.*

In Spain the *cesion de bienes* is distinguished from the *concurso voluntario y preventivo de accredores;* in the former the cession is made by the debtor, and the latter it is resorted to by the creditors. When granted, an administrator of the debtor's property is appointed, and he gives security to pay if he should arrive at better fortune (*k*).

By the Bankrupt laws of England, and by the corresponding Insolvent laws of the West India colonies, and of some of the United States, not only is the person of the bankrupt or insolvent protected against all debts which were proveable against him, but those debts are also discharged; and under the sequestration law of Scotland, in the case of mercantile bankruptcy, the bankrupt's debts may also be discharged.

Under those systems of jurisprudence in Europe and America, which admit only of the liberation and protection of the debtor's person from imprisonment, or which exempt only certain portions of his property from being subject to the satisfaction of the debts owing by him at his bankruptcy, it is obvious that there is not only no extinction of his debts, but they remain subsisting so far as his estate to be administered under these systems, fails to satisfy them. It follows then that the obligation of the surety is not extinguished by the discharge of the bankrupt, nor does the bankruptcy of one surety extinguish the obligation of his co-sureties; for an exception which is not inherent in and does not discharge the debt, but merely is personal to a party, cannot avail another.

"Hic igitur ab initio tenenda talis est regula; Quod Exceptio mere personalis, seu personæ Rei principalis medullitus

(*k*) Cur. Philip, § 24, p. 2, p. 165. Salgad. Labyr. Cred. p. 1, c. 1. l. 7. tit. 32, lib. 11. Nov. Precop.

cohærens, ad fidejussorem nequaquam porrigatur" (*l*). But it is not on this rule alone that the discharge of the principal under the bankrupt law can not avail the surety. The great object of the creditor in providing by a surety against the default of his debtor would be defeated, if his debtor's bankruptcy, and consequent inability to pay, were allowed to deprive him of resort to his surety.

Exceptio Cessionis Bonorum à debitore principali factæ; hæc enim fidejussori nec competit, nec prodest. Atque ideo creditor, qui fidejussores unà cum reo principali obligatos habet, cessionem debitoris acceptare non cogitur, sed potest spreto debitoris beneficio impunè contra fidejussores, secundùm formam literarum, in quibus se obligârunt, procedere. Cur tamen hæc exceptio fidejussori non competat, non ea propriè est ratio, quia scilicet est personalis; sed quia is, qui fidejussorem accipit, hoc maximè prospicit, ut facultatibus lapso debitore à fidejussore suum servet, ideoque provisio creditoris hanc exceptionem potiùs impedit, quàm quod illa ipsa personæ cohærere censetur (*m*).

Under the bankruptcy law in England, and the sequestration in Scotland, the principal may become discharged of his liability, and the surety may, in like manner, be discharged of his liability and obligation; but the certificate which the principal obtains under the bankrupt law of England, or the deliverance under the sequestration in Scotland, does not discharge the surety, neither does the certificate or deliverance

(*l*) Hering. c. 27, p. 390. See 1 Domat. Civ. Law, b. 4, tit. 5, § 1. Morris *v.* Eves, 11 Martin's Rep. 750. See Mather *v.* Rush, 17 Johns. Rep. 424, n.; 2 Bell. Com. ch. 5, § 1162-1164, pp. 563-567. Id. pp. 580-587. Phillips *v.* Allan, 8 B. & C. 477; 2 Kent. Comm. Lect. 37, pp. 389-404.

(*m*) Hering. c. 27, p. 392, 393. Coler. de Proces. execut. Part 1, c. 6, n. 113. Cujac. lib. 19, observat. c. 29.

of a surety discharge his co-sureties in respect of any debt or default which was proveable under the fiat or sequestration (*n*).

A more detailed examination of the provisions of the bankruptcy and sequestration of the principal and sureties, so far as they regard the rights of the creditor against them, and of the surety against the principal, and of the sureties against each other, will require and receive a separate consideration (*o*).

(*n*) Browne *v.* Carr, 2 Russ. 600. S. C. 7 Bing. 508. Ex parte Williamson, 1 Atk. 84. See Taylor *v.* Mills, 2 Cowp. 525. Young *v.* Hockley, 3 Wils. 346. Inglis *v.* Macdougal, 1 Moore, 196. Clements *v.* Langley, 2 Nev. & Man. 269. Baxter *v.* Nichols, 4 Taunt. 90; 6 Geo. 4, c. 16, s. 121.

(*o*) See inf.

CHAPTER XIV.

THE LAW WHICH GOVERNS THE EXTINCTION OR DISCHARGE.

General rule that the *lex loci contractus*, which governs the constitution, and the rights and obligations of the contract, also governs its extinction and discharge.—Cases in which this rule may not apply, and where the law of the country in which the discharge takes place must be adopted.—Rule established generally under the several systems of jurisprudence here considered, that what is a discharge in *loco contractus*, is a discharge everywhere.—Cases in which bankruptcy will not operate as an extinction or discharge of the debt.—The discharge must extinguish the debt, and not merely bar the remedy.—The prescription which is admitted in the latter case is that established by the *lex loci fori*.—Cases in which the prescription extinguishes the debt.—The Jamaica and Grenada acts.

It has been considered as a proposition established by the opinions of jurists, and generally by the concurring course of judicial decisions, that the rights and obligations which a contract imports, as well as the constitution of the contract itself, must be decided by the *lex loci contractus*. It seems to follow as a necessary consequence of this proposition, that the performance of the contract, and the satisfaction, discharge, or extinction of these rights and obligations, must be governed by the same law.

The texts which have been already cited from jurists in support of the first equally sanction the latter proposition.

That which constitutes the performance or satisfaction of the contract, or extinguishes or discharges the rights and obligations which it imports, must be deemed as much part of the contract, as if the manner of the performance, extinction, or discharge had been expressly stated in the contract. If, for instance

novation or *delegation* in *loco contractus* has the effect of extinguishing the original obligation, or if compensation operate *pleno jure* as payment, these are properties which attach to and are part of the original contract, and must therefore be governed by the *lex loci contractus*. Such is the opinion conveyed by J. Voet (*a*).

"Si adversus contractum aliudve negotium gestum factumve restitutio desideretur; dum quis aut metu, aut dolo, aut errore, lapsus, damnum sensit contrahendo, transigendo, solvendo, fidejubendo, hereditatem adeundo, aliove simili modo; recte interpretes statuisse, arbitror, leges regionis in quâ contractum gestumve est, id, contra quod restitutio petitur, locum sibi debere vindicare, in terminandâ ipsâ restitutionis controversiâ; sive res illæ, de quibus contractum est, et in quibus lœsio contigit, sive eodem in loco, sive alibi sitæ sint. Nec interit utrum lœsio circa res ipsas contigerit, veluti pluris minorisve, quam æquum est, errore justo distractas, an vero propter neglecta solennia in loci contractûs desiderata. Si tamen contractûs implementum non in ipso contractûs loco fieri debeat, sed ad locum alium sit destinatum, non loci contractûs, sed implementi, leges spectandas esse ratio suadet: ut ita secundam cujus loci jura implementum accipere debuit contractus, juxta ejus etiam leges resolvatur."

Burgundus lays down the rule: "Idem ergo de solutionibus dicendum, scilicet ut in omnibus quæ ex câ sunt, aut inde oriuntur, aut circa illam consistunt aut aliquo modo affinia sunt, consuetudinem loci spectemus, ubi eandem implere convenit. Itaque ex solutione sunt solemnia, valor rei debitæ, pretium monetæ: ex solutione orientur præstatio apochæ, antigraphi, similiaque. Affinia solutioni sunt, præscriptio, oblatio rei debitæ, consignatio, novatio, delegatio, et ejusmodi" (*b*). And

(*a*) Voet, lib. 4, tit. 1, n. 29. Mynsinger., cent. 4, obs. 82, n. 5, 6. Christin. vol. 2, decis. 134, n. 3, 4. Fab. Cod. lib. 2, tit. 31, def. 2, 3.

(*b*) Burgund. tract. 4, n. 27, 28, 2 Boull. Obs. 46, p. 462, 472, 475, 476.

again: "Ea quæ ad complementum vel executionem contractus spectant, vel absoluto eo superveniunt, solere à statuto loci dirigi, in quo peragenda est solutio. Rationem mutuantur à Jurisconsulto qui unumquemque vult, in eo loco contraxisse intelligi, in quo, ut solveret, se obligavit" (*c*).

This rule would equally apply if the place in which the contract was made, were also that in which it was to be performed, as it is always presumed to be, unless some other place is named. Huber and Casaregis also adopt the same opinion (*d*).

Again, the question whether the contract is performed, and the rights which it confers and the obligations which it imposes are extinguished, necessarily involves the merits of the cause, the "decisioria causæ" "litis decisionem." In the opinion of jurists they are governed by the *lex loci contractus*. "In iis quæ spectant decisioria causæ, et litis decisionem, inspiciuntur statuta loci ubi contractus fuit celebratus, quoad effectus causatos vel causandos ex ipso contractu, secundum naturam contractus, nullo facto extrinseco occurrente" (*e*). "Quod si de causæ meritis agatur, quæ spectant ipsam decisionem negotii principalis, adhibendæ distinctiones antea propositæ." And according to these distinctions, Voet adds, "si in personam ex contractu, locus contractus vel ratione initii vel implementi" (*f*).

A similar opinion is expressed by Casaregis: "Item videmus dispositionem municipalem unius loci etiam alio se extendere quoad contractus gestos in municipio, non ad insinuandam jurisdictionem statuentium in alienum territorium, sed ad hoc, ut judex territorii exteri, sine læsione propriæ jurisdictionis,

(*c*) Burgund. Tr. 4, n. 29. 2 Boull. ib. p. 498.

(*d*) P. Voet, § 9, c. 2, n. 20. Christin. vol. 1, decis. 283, and vol. 2, decis. 134. Huber, lib. 1, tit. 3, § 3, 7. Casareg. decis. 179, § 60, 61, Fab. Cod. ib. Sande's Decis. lib. 1, tit. 12, def. 5. Pardessus, tom. 5, n. 1495.

(*e*) 2 Boull. 461. Voet de Stat. § 10, n. 13. Casareg. disc. 43; 130, n. 28.

(*f*) Voet, ib. Casareg. ib.

servare debeat in decisoriis talis contractus, leges, et consuetudines loci, ubi gestus fuit" (*g*).

The same rule has been adopted in England and America (*h*). If infancy be a valid defence by the *lex loci contractus*, it will be a valid defence everywhere (*i*). A tender and refusal, which by the same law operate either as a full discharge or as a present fulfilment of the contract, will be allowed the same operation everywhere (*j*). Payment in paper money, bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere (*k*). And, on the other hand, where a payment by negociable bills or notes is, by the *lex loci contractus* held to be conditional payment only, it will be so held, even in States where such payment under the domestic law would be held absolute (*l*); so if, by the law of the place of a contract (even though negociable,) equitable defences were allowed in favour of the maker, any subsequent indorsement will not change his rights in regard to the holders (*m*). The latter must take it, *cum onere* (*n*).

The rule that the law of the country in which the contract is made, or in which it is to be performed, must determine whether the obligation which it created has been satisfied, extinguished, or discharged, is so general, as almost to be of uni-

(*g*) Rot. Genuen. dec. 38, n. 3. Casareg. disc. 43, n. 19.

(*h*) Kent. Com. Lect. 39, p. 459. Potter *v.* Brown, 5 East, 124. Dwarris on Stat. Part 2, pp. 650, 651; 2 Bell. Comm. § 1267, pp. 691, 692. Id. p. 688.

(*i*) Thompson *v.* Ketcham, 8 Johns. Rep. 189. Male *v.* Roberts, 3 Esp. R. 163.

(*j*) Warder *v.* Arell, 2 Wash. Virg. R. 282, 293, &c.

(*k*) Ibid. 1 Brown. Ch. R. 376. Seabright *v.* Galbraith, 4 Dall. 325. Bartsh *v.* Atwater, 1 Connect. Rep. 409.

(*l*) Ibid.

(*m*) Blanchard *v.* Russell, 13 Mass. R. 1.

(*n*) Ory *v.* Winter, 16 Martin's Rep. 277. See also Evans *v.* Grey, 12 Martin's Rep. 475. Chartus *v.* Cairnes, 16 Martin's Rep. 1; Story's Confl. of Laws, p. 486.

versal application. Generally, the manner in which the obligation can be satisfied, extinguished, or discharged, is inherent in the contract, and part of the same law which gives it validity. The same law which creates the *vinculum* of the contract also prescribes the means by which it may be terminated. All jurists concur in considering that the satisfaction, extinction, or discharge, must be governed by the same law which governs the contract itself. A qualification of the generality of this rule has been insisted on by jurists. They consider that it must be confined to those causes of extinction or discharge "quæ oriuntur ex contractu, quæ ipsum contractum ab initio comitabantur." (*n*)

M. Fœlix, in his learned treatise on the Conflict of Laws, has urged this qualification with great care, and for the purpose of illustrating and enforcing it, has adopted the distinction between what he and other jurists of France call "les effets," or "suites immédiates et médiates," and "les suites ou conséquences accidentelles." The former, he says, are (*o*),

"Les droits et obligations que les parties ont positivement entendu creer les droits et obligations inhérents au contrat, c'est-à-dire qui y sont contenus expressement ou implicétement, ou qui en resultent mediatement ou immediatement: il n'y a pas lieu à distinguer si ces droits et obligations sont ou non actuellement ouverts ou exigibles; ou s'ils ne sont qu'éventuels et expectatifs." By "de suites de contrat," he says, "on comprend les obligations ou le droits que le législateur fait naître à l'occasion de l'éxecution de l'acte ou du droit: les suites n'ont pas une cause inherénte au contrat même: elles resultent d'événements posterieurs au contrat et qui surviennent

(*n*) Voet, lib. 4, tit. 1. P. Voet de Stat. c. 10, § 3. Hertius de Coll. Leg. ff. 66. Boullenois, tom. 2, tit. 4, c. 2, p. 456.

(*o*) Boullenois, tom. 1, 39th Prin. p. 9, tom. 2, p. 477. Merlin Rep. Effet. Retroact. l. 3, ff. 3, Art. 4. M. Blondeau Essai sur l'Effet. p. 191.

à l'occasion des circonstances dans lesquelles le contrat a placé les parties.

"La règle exposée aux numeros précédents s'applique aux actions en rescision, résolution, révocation, ou réduction des contrats, lorsque ces actions ont leur racine dans le contrat même (ou sont contenu exprès ou implicite,) et non dans les faits postérieurs à sa conclusions. Au premier cas, lesdites actions appartiennent à la classe des effets du contrat, (v. *supra*, No. 85,) en conséquence, le juge ne pourra admettre d'autres causes que celles autorisées par la loi du lieu du contrat, et il aura les admettre si elles sont fondées dans cette loi, "C'est," dit Merlin, "parceque les nices du contrat sont inhérents au contrat même, parcequ'ils en font essentiellement partie, parceque les contractants ont été avertis, par la lois que président à leur traité, des nices qu'ils renferment et qu'ils ne s'ont souscrit que sous la réserve tacite de la faculté qu'elle leur accordait à l'une et à l'autre ou à l'un d'eux seulement de le faire annullée ou rescindée." Ainsi, lorsque la loi du contrat accorde à l'acheteur comme au vendur le droit de faire rescinder la vente pour cause de lésion, l'action de l'acheteur devra être accueillir en France, nonobstant l'art. 1683 du Code Civil.

"Si les actions en recision, résolution, révocation, ou réduction, sont basées sur des causes survenues posterieusement du contrat, et dépendantes de la volonté du défendeur, elles constituent des suites du contrat et après ce que nous avons dit *supra*, No. 85, elles sont regies par la loi du lieu où ces faits se passent. On peut citer comme exemples la résolution immediate d'un contrat de vente contenant la clause indiquée à l'art. 1656 du Code Civil, après une sommation signifiée sous l'empire de ce Code, bien que la loi du contrat ne régarde cette clause que comme comminatoire: de même la résolution du contrats de constitution d'une rent lorsque le debiteur cesse pendants deux ans le paiement des avrages (Art. 1912 du Code Civil)."

Mr. Justice Story also adopts this qualification, "We are not to understand," he says, "that it thence follows, as a necessary consequence, that in no cases whatever can a contract be discharged or dissolved, except in the mode and by the process and formalities prescribed by the same law; or, in other words, that it must be discharged and dissolved *eo ligamine, quo ligatur*, or rather by reversing the operation, which knit it under the local law (*p*). On the contrary, there are or may be circumstances under which an opposite rule may be maintainable: and the law of another country, prescribing different modes of proceeding, or different formalities, or different acts, which shall establish a dissolution thereof, may also well prevail to annul or discharge the contract. A change of domicil of the parties to the latter country, or an act done in that country, which would there operate to dissolve or discharge the contract, may well produce the fullest effect, although the same act might not be recognised by the law of the place of the origin of the contract. Thus, for example, as the obligation of a bond or other sealed instrument, after a breach of the contract created thereby, cannot in England be discharged or released, except by a sealed instrument, or a release under seal, according to the known maxim of the common law: "Eodem modo, quo quid constituitur, eodem modo dissolvitur." And yet by the law of most, if not of all the continental countries, whose jurisprudence is founded on the Roman law, a simple receipt or discharge not under seal would, if executed in such countries, be held to discharge the bond, or other sealed instrument.

"Let us, then, suppose a bond executed in England, for the payment of money, and when it becomes due there should be a default in payment, and afterwards the creditor should

(*p*) Story, ib. 226, 411, and see Warrender *v.* Warrender, 9 Bligh. Rep. 124, 125, 226.

receive payment of the debtor in France, or otherwise should discharge him by a written unsealed instrument in France, such a discharge would in France be held valid and conclusive, if good by the law of France, notwithstanding it might be held invalid in an English Court of common law. In short, any act done after such an obligation was created in a foreign country, by whose laws the act would operate as a dissolution thereof, would be treated in that country, at least, as a complete extinguishment thereof."

"It is not easy, therefore, upon principle, to say why such an extinguishment of a contract, according to the *lex loci*, ought not everywhere else to have the same operation, even in the country of the origin of the contract; for if the contract derives its whole obligatory force from the law of the place where it is made, it is but following out the same principle to hold, that any act subsequently done, touching the same contract by the parties, should have the same obligatory force and operation upon it, which the law of the place where it is done attributes to it. And in this respect there certainly is, or at least may be, a clear distinction between acts done by the parties in a foreign country, and which derive their operation from their voluntary consent and intention, and acts *in invitum*, deriving their whole authority and effect from the operation of the local law, independent of any such consent" (*q*).

"Indeed, the reasonable interpretation of the general rule would seem to be, that while contracts made in one country are properly held to be dissoluble and extinguishable, according to the laws of that country, as natural incidents to the original concoction of such contracts, they are, and may at the same time also be equally dissoluble and extinguishable by any other acts done, or contracts made, subsequently in another country by the parties, which acts or contracts, accord-

(*q*) Story, § 411.

ing to the law of the latter country, are sufficient to work such a dissolution or extinguishment (*r*).

Lord Brougham, in the elaborate and eminently powerful judgment delivered by his lordship in *Warrender* v. *Warrender*, says, "If a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed, by the law and by the forms of another country, in which the parties happen to reside, and in whose Courts their rights and obligations come in question, unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But, at any rate, this is certain, that if the laws of one country and its Courts recognise and give effect to those of another in respect to the constitution of any contract, they must give the like recognition and effect to those same foreign laws, when they declare the same kind of contract dissolved. Suppose a party forbidden to purchase from another by our equity, as administered in the Courts of this country, (and we have some restraints upon certain parties which come very near another prohibition); and suppose a sale of chattels by one to another party, standing in this relation towards each other, should be effected in Scotland, and that our Courts here should (whether right or wrong,) recognise such a rule because the Scotch law would affirm it; surely it would follow that our Courts must equally recognise a rescision of the contract of sale in Scotland by any act which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waived for some reason,—if the party resisting its execution were to produce either a sentence of a Scotch

(*r*) Story, p. 304, 305, 306.

Court, declaring it rescinded by a Scotch matter done *in pais* or were merely to produce evidence of the thing so done, and proof of its amounting, by the Scotch law, to a rescision of the contract; I apprehend that the party relying on the contract could never be heard to say, "the contract is English, and the Scotch proceeding is impotent to dissolve it." The reply would be, "our English Courts have (right or wrong) recognised the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar but reverse proceeding to dissolve it,—'Unum quodque dissolvitur eodem modo, quo colligatur.'

"Suppose, for another example, (which is the case,) that the law of this country precluded an infant or a married woman from borrowing money in any way, or from binding themselves by deed, and that in another country those obligations could be validly incurred, it is probable that our law and our Courts would recognise the validity of such foreign obligations. But suppose a *feme covert* had executed a power, and conveyed an interest under it to another *feme covert* in England, could it be endured, that where the donee of the power produced a release under seal from the *feme covert* in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said that our Courts, having decided the contract of a *feme covert* to be binding, when executed abroad, must, by parity of reason, hold the discharge or release of the *feme covert* to be valid, if it be valid in the same foreign country?" (*s*)

There is no difficulty in admitting this qualification in its fullest extent, when the question arises on the dissolution of such a contract, as has the effect of constituting the status of persons. The contract which constituted the status of husband

(*s*) Warrender *v.* Warrender, 9 Bligh. Rep. 125, 127.

and wife is governed by the *lex loci contractus*, so long only, as the parties retain their domicil in that place. But if they change their domicil, they become subject to the law of their new domicil; their status is subject to, and will be dealt with and regulated by that law. That law may dissolve the contract, and put an end to the status of husband and wife. It may, therefore, dissolve the marriage by a divorce, although the contract of marriage was indissoluble by the law of the county in which it was contracted. Upon this ground, the case of *Warrender* v. *Warrender* was decided in the House of Lords. The marriage had taken place in England, and the divorce of the parties in Scotland was held effectual to dissolve the marriage.

Other cases may be mentioned in which the qualification would be admitted, as where a cause for rescinding or being relieved from an obligation had no existence at the time of the contract, but had arisen subsequently in another country. This is in accordance with the distinction adopted by Hertius in discussing this question, "Summopere autem heic notandum, ne inter ea quæ contractus consequuntur vel ex iis profluunt, habeamus extrinsecus, et ex accidenti subsequentia contractus. Quod dum multi ignorant aut non discernunt, forenses maximopere lædere aut gravari non temere dixit Mevius (*q*). Titius alibi contrahit, alibi propter contractum illum restitutionem in integrum petit, ubi tempora restitutionis sunt laxiora; quæritur, cujus loci cura considerari debeant. Pro loco contractus in Senatu Sabaudico pronunciatum testatur (*r*). Distinguunt vulgo an restitutio petatur ex ea causa quæ iam locum habuit tempore contractus posteriori id quod obtinet in loco judicii (*s*).

(*q*) Ad Jus. Lubec. Quæst. prælim. 4, n. 18, *et seq.*

(*r*) Fab. lib. 1, ad Cod. 5, n. 3. Buseus ad l. 6, de Evictione, n. 2. F. Hotoman Cons. 52, n. 13.

(*s*) Bartol. ad Cod. tit. 1. Baldus. n. 12.

Nobis perplacet hæc distinctio: nam prior restitutio fluit ex contractu, certe appendix est contractus, quia ad vim et effectum obligationis pertinet.

Nimirum valet hæc regula etiam in extero, qui actum celebrat; licet enim hic subjectus revera maneat patriæ suæ tamen illud, ut supra diximus, de acto primo est intelligendum, quoad actum vero secundum subditus illius loci fit temporarius ubi agit vel contrahit, simulque ut forum ibi sortitur, ita statutis ligatur (*t*). Valet ut extendatur ad consequentia sive profluentia ex actu illo principali.

Quæ enim auctoritate legis vel consuetudinis contractum concomitantur eidemque adhærent, naturalia a Dd. appellantur: et sicut consuetudo ita etiam lex et statutum est altera quasi natura et in naturam transit (*u*). Hinc quantitas usurarum definienda est secundum leges loci, ubi contractus fuit initus (*v*).

Idem dicendum de solutione; nec obstat forum fieri competens in loco destinatæ solutionis sive ubi ex contractu aliquid præstandum est" (*w*).

P. Voet, and J. Voet, adopt the same distinction.

With respect to the various modes enumerated in the preceding Chapters, by which the obligation would be extinguished, there would not be a conflict between the laws of any other country, but the law of the place of the contract or that of the place of its performance, and the law of the place of the Forum.

Thus, the extinction of the obligation by the non-performance by the creditor of a condition precedent to his right to

(*t*) Gloss. in l. 2, deca quod certo loco, c. 9. Quod Clericis. de foro Compet. Mevius Quæst. prælim. ad J. Lubec, 4, n. 10, *et seq.*

(*u*) Mantica de Tacit. et Ambig. Convent. tit. 13, n. 10; tit. 14, n. 4. Scepio. Gentil de Sol. c. 4,

(*v*) Consult. Holl. Part 2, cons. 1.

(*w*) Brunnem. ad Pand. lib. 21, n. 2, l. 6, n. 9, 10. Hert. de Coll. Leg. l. 4, § 10. P. Voet de Stat. s. 9, c. 2, n. 12, *et seq.* J. Voet, lib. 4, tit. 1, n. 29.

resort either to the principal or the surety would be determined by the *lex loci contractus* (*x*). "Conditio contructui est adjecta in Belgio, quæ debitore in Germania existente adimpletur, si vero diversa utriusque sint jura, quæritur, quæ prævalebunt? Respondemus Belgii, quia conditio expleta retrotrahitur ad tempus conventionis.

But the *lex loci contractus* or the *lex loci implementi* cannot be invoked unless it has the virtual and direct effect of discharging or extinguishing the debt or obligation. It will govern in all those modes of discharge and extinction enumerated in the preceding Chapters of this Book, except in the cases of prescription and bankruptcy.

Whether the *lex loci contractus* should be adopted as to the exceptions of prescription and bankruptcy must depend on the nature and character of the prescription and the effect of the bankruptcy. If there is an absolute extinction of the debt in those cases, the *lex loci contractus* will prevail, but if in prescription the remedy only is barred, it cannot be adopted but the *lex loci fori* must prevail, and so if the bankruptcy discharges only the person or a portion of the property, it will not be recognised in *loco fori*.

Where a debt was contracted in a foreign country, between subjects thereof, who remained there until the debt became barred by the law of limitations of such country, it was held that the Statute of Limitations of Massachusetts could not be pleaded in bar to an action upon the debt, brought within six years after the parties came into that commonwealth (*y*).

It is no answer to the replication of the plaintiff's absence

(*x*) Hert. s. 4, § 54. Sande. Decis. ad l. 9. Dig. lib. 10, tit. 17.

(*y*) Bulger *v.* Roche, 11 Pick. Mass. Rep. 36. Wilson *v.* Appleton, 17 Mass. Rep. 180. Le Roy *v.* Crowninshield, 2 Mason, 151. Pearsall *v.* Dwight, 2 Mass. Rep. 85. Byrne *v.* Crowninshield, 17 Mass. Rep. 55. Williams *v.* Jones, 13 East, 439. Don *v.* Lepman, 2 Shaw & M'Lean, 688.

beyond sea that he was represented in the State by an agent (*z*).

It is the general doctrine that prescriptions or Statutes of Limitation when they bar the action, and do not extinguish the debt, relate to remedies, *ad ordinationem litis*, and not *ad decisionem causæ*, and are to be classed amongst the *ordinatoria*, and not the *decisoria litis*. The *ordinatoria litis*, the form and manner of prosecuting a demand, and generally, the remedies by which it is enforced, are those only which are sanctioned by the law of the country where the action or suit is instituted—*in loco fori*. The prescription or limitation when such is its nature, which exists in *loco contractus* has no effect in *loco fori*: "Nec minus eam sententiam probaveris, quoties de actione personali per præscriptionen tollenda quæstio est, dum alio tempore præscriptio in debitoris, alio in creditoris domicilio impletur; nam et debitum necdum exactum magis esse in potestate judicis, ubi debitor, quàm ubi creditor domicilium fovet, vel ex eo manifestum est, quod creditor forum competens et judicem debitoris sequi debeat; quodque non creditoris, sed debitoris judex inhibere debitori possit ad tertii alicujus desiderium, ne debitor creditori solvat" (*a*).

Huber lays down the same rule: "Præterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione dandâ vel negandâ, aliud juris apud nos, aliud esset ubi contractus erat initus, utrius loci jus servandum foret? Exemplum: Frisius in Hollandiâ debitor factus ex causa mercium particulatim venditarum, convenitur in Frisiâ post biennium. Opponit præscriptionem apud nos in ejusmodi debitis receptam. Creditor replicat, in Hollandiâ, ubi contractus initus erat, ejusmodi præscriptionen non esse receptam: proinde

(*z*) Wilson *v.* Appleton, 17 Mass. Rep. 179.
(*a*) Voet, lib. 1, tit. 8, n. 30; lib. 44, tit. 3, n. 12.

sibi non obstare in hâc causâ. Sed aliter judicatum est, semel in causâ *Justi Blenkenfieldt* contra G. Y., iterum inter *Johannem Joneliin*, sartorem Principis Arausionensis, contra N. B. *utraque ante magnas ferias* 1680. Eâdem ratione, si quis debitorem in Frisiâ conveniat ex instrumento coram Scabinis in Hollandiâ celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causæ cognitione et sententiâ. Ratio hæc est, quod præscriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ, quæ per se quasi contractum separatumque negotium constituit, adeoque receptum est, optimâ ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet Sandius (*b*) ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci, in quo fit executio, non ubi res judicata est" (*c*).

Such also is the opinion of Boullenois: "En effet, quand on excipe de la préscription, on n'attaque pas le contrat en lui-même; on le reconnoît bon et valable dans son principe et dans son essence; mais on soutient seulement que le créancier ne vient pas dans le temps préscrit par la loi du débiteur, ce que ne donne pas atteinte au titre en lui-même, mais à l'action qui est un nouvel acte, et qui ne concerne que *modum procedendi.* En vain diroit-on que la prescription est *exceptio peremptoria*, et que, selon la décision de Balde, *exceptio peremptoria pertinet ad decisionem causæ;* il faut entendre cela d'une exception péremptoire, qui tomberoit sur le contrat, au lieu que dans l'espèce, l'exception ne tombe que sur l'action et la procédure intentée" (*d*).

Pothier treats the prescriptions under the French law as

(*b*) Lib. 1, tit. 12, def. 5.

(*c*) Huber, de Conflict. lib. 1, tit. 3, n. 7. Hommel, Rhaps. Obs. 409, § 16.

(*d*) 1 Boull. Tr. des Stat. tit. 2, c, 3, Obs. 23, p. 530.

bars only to the remedy: "N'éteignent pas la créance, mais ils la rendent inefficace, en rendant le créancier non recevable à intenter l'action qui en naît. Doivent être opposées par le débiteur; le juge ne les supplée pas" (*e*). This is the general opinion of jurists (*f*).

The prescriptions under the Code Civil and Code de Commerce affect only the remedy (*g*), and so the Court of Common Pleas, in a recent case, treated the prescription under that Code with respect to bills of exchange (*h*).

The doctrine of the law of Scotland is thus stated by Erskine: "The prescription of debts due to foreigners is to be regulated by the law of the place where the action itself is instituted against the debtor, or, in other words, by the law of the defender's present domicil, because debtors can be sued before those Courts only to whose jurisdiction they are subjected. Hence an Englishman who has furnished goods in England to a Scotsman need not disquiet himself about the laws of prescription prevailing in Scotland, so long as his debtor continues to reside where he contracted the debt. And indeed, though the debtor returns to Scotland after the expiration of three years, but before the English limitation of six years has taken place, the creditor ought not to be cut off from his claim upon the triennial prescription of Scotland, unless he has delayed to commence a suit for three years after the debtor's return home; 1st, because the statute establishing that prescription, although it is expressed in general terms, cannot by a just interpretation be extended to foreign contracts, as a contract in England is in this question as to Scotland is considered to be, unless the debtor has afterwards

(*e*) Pothier, Tr. des Oblig. n. 677, and Contrat de Change, n. 203.

(*f*) 1 Boullenois Obs. 23, p. 530, 550. 2 Boullenois Obs. 46, p. 455, 456. Casareg. Disc. 179, § 59, 60. P. Voet de Stat. § 10, c. 1, § 1.

(*g*) Art. 2275.

(*h*) Huber *v.* Steiner, 2 Bing. N. S. 202.

resided in Scotland for that whole term of three years; 2ndly, because it is inconsistent with equity that a debtor's fraudulent device to disappoint his creditor by changing domicils, should have the same effect as a discharge of his obligation, without any negligence that can reasonably be imputed to the creditor. If in the case of an English debt, which by the English statute, is limited to a short prescription, but not by the law of Scotland, an action shall be brought in Scotland by the creditor for payment after the years of the English limitation shall have elapsed, the English statute, which is of no proper authority in the Courts of Scotland, cannot be regarded as an extinction of the claim. Nevertheless, it ought in equity to be received as a presumption that the debt is paid, if the creditor shall not elide it, either by direct evidence or by stronger contrary presumptions. These and other rules belonging to it are laid down with great precision, and the contrary judgments censured, by the author of *Principles of Equity* (*h*). By the latest decision on this point, the Court of Session have made the law of Scotland the rule of their judgment" (*i*).

It is to be observed, however, that in all these cases the debtor had left England within the period of the statutory limitation there, so that the Court had no other rule than that of the Scots prescription to go by (*j*).

In the cases of *Delvalle* v. *York Buildings Company*, and *York Buildings Company* v. *Cheswell*, the Scots prescription was finally overruled (*k*).

(*h*) B. 3, c. 8, § 6.

(*i*) Fac. Coll. 1, 156. Renton's Trustees, July 7, 1755, Dict. 4516, 11,124. Fac. Coll. March 2, 1761, M'Neil, Dict. 4517. Ib. July 13, 1768, Randale, Dict. 4520, Hailes, 225. Ib. Feb. 20, 1771, Kerr, Dict. 4522, Hailes, 408. Ib. Feb. 4, 1772, Barrett, Dict. 4524. Ersk. b. 3, tit. 7, § 48.

(*j*) July 30, 1783, Hailes, 926. March 9, 1786, Dict. 4525, as reversed on appeal, March 12, 1788.

(*k*) Feb. 14, 1792, Dict. 4528.

It seems to have been overruled in these cases, because the debtors were "in all respects an English company domiciled in England, and by their charter of erection fixed down to a residence there." Accordingly it was observed, that "if instead of being thus permanent in England they had changed their place of residence to Scotland, and continued there during the forty years, it might have been competent to them to plead the Scots prescription, notwithstanding that England was the *locus contractus*. For it is the *lex domicilii debitoris* which in this matter is the governing rule." "In all cases in which the Court has sustained the Scots prescription against English debts, the debtors were considered as having acquired a residence in Scotland" (*l*).

In conformity with this principle, and with the authorities cited, the Scots prescription was again sustained, and the judgment affirmed in the last resort (*m*).

The foreign prescription, it is said, is the rule in Scotland in all cases where the debtor has remained long enough domiciled in the foreign country to bring it into operation. For the debt being once extinguished abroad cannot be revived merely by the debtor's passing into Scotland.

But the domicil must be real, and not that which was acquired by arrestment of goods *jurisd. fund. causâ* (*n*). This was assumed in all the authorities referred to (*o*).

It has been decided that the Statutes of Limitations in England, as they relate to debts and personal actions, merely bar the remedy but not the debt (*p*).

(*l*) Per curiam, in York Buildings Comp. *v.* Cheswell, *supra*.

(*m*) Fac. Coll. Campbell, Nov. 23, 1813, 6 Dow, 116, and see to the same effect, Fac. Coll. Broughton, Feb. 24, 1826, S. & D. Banner *v.* Gibson, Nov. 24, 1830, F. C. Gibson *v.* Stewart, March 2, 1831, F. C. British Linen Comp. *v.* Drummond, 10 B. & C. 903.

(*n*) Frazer's Trustees *v.* Frazer, Dec. 14, 1830.

(*o*) Lady Haddington, March 6, 1821, F. C., but see Judgment Dom. Proc. reversing this decision, 2 Shaw's cases, 423. Ersk. b. 3, tit. 7, § 48.

(*p*) Higgins *v.* Scott, 2 Bar. & Adol. 413. Tidd, 9th ed. 14 to 33. Chitty's Coll. Stat. 702 to 710, in notes. 1 Chitty's Pract. 764.

It is clearly established by the decisions in England and the United States, that all suits must be commenced within the period established by the law of the country in which the suit is instituted. They reject the prescription prevailing *in loco contractus*, because it is considered that it belongs to the *lex loci fori* to determine whether the action for the recovery of the debt is barred (*q*).

The prescription may, however, from the express terms of the statute by which it is created, extinguish the debt, as well as the action for its recovery. Such is the effect of the Jamaica and Grenada acts, which have been referred to. It will have been perceived that they treat the security as null and void, if it has not been legally demanded within twenty years.

Mr. Justice Story intimates a strong opinion that a distinction must be made when the prescription not merely bars the remedy, but extinguishes the debt. "Suppose," says that learned jurist, "the Statutes of Limitation of a country do not only extinguish the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, and that parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case; in such a case may not such a statute be set up in any other country, to which the parties remove, by way of extinguishment or transfer of the claim or title? Suppose, for instance (as has occurred), personal property is adversely held in a State for a period beyond that prescribed by the laws of that State, and after that period has elapsed, the possessor should remove into another State which has a longer period of prescription, or is without any prescription; could the original owner assert a title there against the possessor, whose title by

(*q*) British Linen Comp. *v.* Drummond, 10 B. & C. 903. Huber *v.* Steiner, 2 Bingh. N. S. 202. 4 Cowen, 528, n. 10. Ib. 530. Van Reimsdyk *v.* Kane, 1 Gall. 371. Le Roy *v.* Crowninshield, 2 Mason, 351. De Couche *v.* Savatier, 3 Johns. Ch. Rep. 190. Lincoln *v.* Battelle, 6 Wend. 475. Story's Com. 483.

the local law, and the lapse of time, had been final and conclusive before the removal? It has certainly been thought that in such a case the title of the possessor cannot be impugned (*r*). If it cannot, the next inquiry is, whether the bar of a statute extinguishment of a debt *lege loci*, ought not equally to be held a peremptory exception? This subject may be thought by some to be open for future discussion. But it should be stated, that as far as the decisions in the American Courts go, they do not sustain the distinction. In all the cases, however, in which the point has been discussed, the statutes under consideration did not extinguish the right, but merely the remedy" (*s*).

This opinion is thus commented on by the late Chief Justice of the Common Pleas: "Undoubtedly," says that learned Judge, "the distinction, when taken with the qualification annexed to it by the author himself, appears to be well founded. That qualification is, 'that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case;' and with such restriction it does indeed appear but reasonable that the part of the *lex loci contractus*, which declares the contract to be absolutely void at a certain limited time without any intervening suit, should be equally regarded by the foreign country as the part of the *lex loci contractus* which gives life to, and regulates the construction of the contract; both parts go equally *ad valorem contractus*, both *ad decisionem litis*" (*t*).

If the proceedings consequent on the *cessio bonorum*, insol-

(*r*) Beckford *v.* Wade, 17 Ves. 88. Newby *v.* Blakely, 3 Hen. & Mum. 57. Brent *v.* Chapman, 5 Cranch, 358. Selby *v.* Guy, 11 Wheat. 371.

(*s*) De Couche *v.* Savatier, 3 Johns. Ch. Rep. 190, 218, 219. Van Remsdyk *v.* Kane, 1 Gall. 371. Le Roy *v.* Crowninshield, 2 Mason, 131, and the cases there cited. Lincoln *v.* Battelle, 6 Wend. 475. 1 Domat, b. 3, § 4, Art. 1, p. 464. Ib. Art. 10, p. 466. Voet, ad Pand. lib. 44, tit. 3, n. 12. Story's Com. 487.

(*t*) Huber *v.* Steiner, 2 Bing. N. S. 211.

vency, or bankruptcy of the debtor operate only as a discharge of his person from imprisonment, but leave the debt still subsisting, and to be satisfied out of his future property, which will be liable to be taken in execution on account of such debt, there is no ground for considering that this qualified discharge can be available to him in the Courts of any other country but that in which he has obtained it. The law of that country cannot abridge the remedies by which the law *in loco fori* enables the creditor to enforce execution of his judgment (*u*).

But when they discharge the debt, it becomes a question whether the debtor can avail himself of that discharge if he be sued in a foreign tribunal. The decisions under the jurisprudence of England, Scotland, France, the Colonies, and the United States, have established that if the country in which the bankruptcy took place, and in which consequently the discharge was acquired, be also the *locus contractus*, the discharge will be available as an answer to an action for the debt, in whatever country it may be instituted.

On the other hand, if the country in which the discharge was obtained were not the *locus contractus*, the debt is not discharged, and a foreign tribunal will not give effect to the discharge (*v*).

This distinction is adopted by the Court of Session in Scotland. Thus, where part of the debt was liquidated by a bill payable at Berwick, and the residue of the demand resting on the original contract was payable in Scotland, it was held, that so much of the debt as consisted of the bill was an English debt, and discharged by the certificate under the English bankrupt law, but that the balance was a Scottish debt, and not discharged by it (*w*).

(*u*) *Supra.*

(*v*) Smith *v.* Buchanan, 1 East's Rep. 6. Hunter *v.* Potts, 4 T. R. 182, 192, Ballantine & Golding.

(*w*) Sir James Rochead *v.* Scott, June 30, 1724, Edgar, 60. Marshall

This doctrine is in conformity with the opinions of the Dutch jurists, and is also admitted in the judicial decisions of the United States (*x*).

Quelin, the appellant, had been declared a bankrupt by a judgment of the Tribunal of Commerce at Nantes, on the 20th of January, 1823. He obtained a protection from arrest, *sauf conduit*, but afterwards absconded to Jersey. In his absence he was prosecuted for a fraudulent bankruptcy, and was condemned *par contumace* to five years' imprisonment and hard labour (*travaux forcés*). Previously to his bankruptcy, he had given a note of hand for seven thousand francs (*billet à ordre*) to a widow of the name of Nau, in Nantes. She proved the amount of this note as a debt under the bankruptcy, but did

v. Yeaman and Spence, June 20, 1746, 1 Falcon. 147. Christie *v.* Straiton, Nov. 4, 1746, Kilk. 203. Coalston *v.* Stewart, Aug. 3, 1770, Hamilton's Coll. 110. Watson *v.* Renton, Jan. 21, 1792, Dict. 4582, 8 Fac. Coll. 409, Bell's cases, 92. 2 Bell's Com. p. 688, 689, note 4. Armour *v.* Campbell, Jan. 21, 1792, 8 Fac. Coll. 417. Stein's case, 2 Dow's App. Cas. 230. 2 Rose's Cas. 291. Gordon *v.* Gordon, Nov. 12, 1818, F. C. Odwin *v.* Forbes, Privy Council, May 31, 1815, Buck's Rep. 57. Richardson *v.* Lady Haddington, 2 Shaw's App. 406.

(*x*) Van Raugh *v.* Van Arsdaln, 3 Caine's Rep. 154. Smith *v.* Smith, 2 Johns. Ch. Rep. 225. Blanchard *v.* Russell, 13 Mass. Rep. 1. Bradford *v.* Farrand, ib. 18. Van Reimsdyk *v.* Kane, 1 Gall. Rep. 371. Le Roy *v.* Crowninshield, 2 Mason's Rep. 151. Green *v.* Sarmiento, 1 Peters's U. S. Rep. 74. 2 Kent's Com. p. 459. Thompson *v.* Ketcham, 8 Johns. Ch. Rep. 189. Warder *v.* Arell, 2 Wash. Virg. Rep. 282, 293, *et seq.* Seabright *v.* Calbraith, 4 Dall. 325. Bartsth *v.* Atwater, 1 Connect. Rep. 409. Ory *v.* Winter, 16 Martin's Rep. 277. Evans *v.* Gray, 12 Martin's Rep. 475. Chartus *v.* Cairness, 16 ib. 1. Van Cleff *v.* Terasson, 3 Pick. Rep. 12. 13 Mass. Rep. 7. Hicks *v.* Brown, 12 John. Ch. Rep. 142. Baker *v.* Wheaton, 5 Mass. Rep. 511. Watson *v.* Bourne, 10 ib. 337. 4 Cowen's Rep. note, p. 515. M'Menomy *v.* Murray, 3 Johns. Ch. Rep. 435, 440, 441. Walsh *v.* Nourse, 5 Binn. Rep. 381. Sturgis *v.* Crowninshield, 4 Wheaton's Rep. 122. Ogden *v.* Saunders, 12 ib. 213, 358. Atwater *v.* Townsend, 4 Connect. Rep. 47. Hempstead *v.* Reed, 6 ib. 480. Houghton *v.* Page, 2 N. Hamp. Rep. 42. Dyer *v.* Hunt, 5 ib. 401. Prentiss *v.* Savage, 13 Mass. Rep. 20. Story's Com. p. 273, 274, 275, 276.

not attend the meeting for the appointment of an assignee (*syndic definitif*), and banker, and afterwards indorsed the note over to a third person, who indorsed it to the respondent, the plaintiff in the Court below, an inhabitant of Jersey. He sued the appellant for the amount of the note in the Royal Court there. The appellant pleaded his bankruptcy in France in bar of the action, and on his plea being overruled, he appealed to the Privy Council. Their Lordships ordered the following questions to be referred to two French advocates to be named by the British ambassador at Paris: 1st, Whether a person whose property had passed to syndics under the law *de la faillité*, could afterwards be sued by any creditor who had proved his debt before the syndics? 2ndly, If generally such person could not afterwards be sued by such a creditor, did he lose that protection by a sentence *par contumace*, and by competent judges, for not being able to give a proper account of his receipts and disbursements, for having misapplied several sums of money and other property to the prejudice of his creditors, for having concealed his books, or not having kept them, and for having violated the *sauf conduit* granted him by the Tribunal of Commerce? The ambassador made choice of Messrs. Delagrange and Dupin ainé, and they gave their opinion on the first point, "that the bankrupt could not be sued even by a creditor who had not proved his debt before the syndics, and *à fortiori* could not be sued by one who had proved;" and upon the second, "that the sentence *par contumace*, would not have any effect so as to give a new right to sue to a creditor." Their Lordships, on the 23rd of February, 1828, reversed the judgment of the Court below (*y*).

On the other hand, where a debt had been contracted in Berbice, and a commission of bankruptcy had been issued in England against the debtor, under which he had been declared a bankrupt, and afterwards obtained his certificate, it

(*y*) Quelin *v.* Moisson, July 14, 1827, 1 Knapp's Rep. 266.

was held that the certificate was no bar to an action brought by the creditor against the heir of the debtor.

The late James Crawford M'Leod and John Bethune were partners in a plantation concern, called New Geanies, in the colony of Berbice, and the pursuer, Rose, was a creditor of the company for debts contracted in the colony, and which were secured on the plantation. In 1811 M'Leod came to England, where a commission of bankruptcy was issued against him, and a dispute having taken place between his assignee and Rose, (the former of whom alleged that, on a correct accounting, it would be found that Rose was indebted to M'Leod,) a reference was made to Mr. King, a merchant in London, who issued a judgment in the form of a letter, stating that he was of opinion that a certain sum was due to Rose. Rose, however, did not prove his debt against M'Leod's estate, but adopted measures for recovering it in the colony of Berbice, before the Courts of which he obtained a decreee finding him to be a creditor of M'Leod and Bethune for 3833*l.* 19*s.* 10*d.*, and this judgment was affirmed, on appeal, by the King in Council. M'Leod having died after obtaining a certificate under the commission of bankruptcy, discharging him of his debts, Rose brought an action before the Court of Session against his son and heir, concluding for payment of the above sum.

It was insisted on the part of the defender that this debt must be held to be an English debt, because, although it was contracted in Berbice, yet by entering into the reference with the English assignees, and by the judgment which was in consequence pronounced, Rose had as completely made it an English debt, as if he had taken a document for it in that country: and that this reference and relative judgment were equivalent to proving the debt under the commission of bankruptcy, or at least were sufficient by the law of England to place Rose in the situation of a claimant against the assignees, and so liable to be affected by the certificate.

The Lord Ordinary held that the debt was not barred by the certificate.

To this interlocutor the Court, after advising a condescendence and answers, and certain documents as to "the nature and course of the proceedings, held with respect to the claims in question, before the assignees and arbiter," adhered, but found no expenses due.

The only difficulty which the Court had, was as to the effect of the proceedings before the arbiter, which at first appeared to them to amount to a constitution of the claim within England. But on investigation, a majority of the Judges were satisfied that the reference was merely entered into with the view of satisfying the assignees that they had no claim against Rose, and that it was not intended thereby to constitute his debt, or to make a claim against them (*x*).

It has been decided by the Privy Council, that a certificate obtained under a commission of bankrupt in England, was a bar to an action for a debt contracted by the bankrupt at Calcutta, previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta.

The Supreme Court in Calcutta had decided that it was no bar, and the appeal was from their judgment. The grounds on which it was reversed are not stated, but the reason for reversing it, as assigned in the appellant's printed case, was that the certificate was duly obtained by the appellant by virtue of the several statutes concerning bankrupts in England, and was, by the law of England, a legal bar to all debts contracted prior to the appellant becoming bankrupt, and among others, to the debts contracted in Calcutta, a place governed by and subject to the laws of England. The reason assigned by the respondent, in support of the judgment, was, that the law of England, by which a bankrupt is discharged by his certificate

(*x*) Rose *v.* M'Leod, 4 S. & D. 311.

from debts contracted before his bankruptcy, depends upon a statute which has no provisions applying to a debt contracted and sued for in the East Indies.

The case being one of great importance, their Lordships took time to deliberate upon it, and the final judgment of the Court was delivered by the Lord Chancellor in writing, on the 4th of March, 1830, in these terms. "I have read and considered the papers in the above case, and am of opinion that the judgment of the Court in India ought to be reversed. I think the certificate was in this case a sufficient bar" (*a*).

(*a*) Edwards *v.* Ronald, 1 Knapp's P. C. Rep. 265.

BOOK III.

THE RIGHTS OF THE CREDITOR AND SURETY IN RELATION TO EACH OTHER.

THE rights of the creditor against the surety are so necessarily connected with the privileges, which under the civil law, and almost all the codes of the jurisprudence of foreign States, can be claimed by the surety against the creditor in enforcing those rights, that both must be considered together. The latter are subject to and qualified by the privileges which the law has conceded to the surety. The surety by claiming them does not deny, on the contrary, he admits the obligation to the creditor, but he insists that the creditor is not entitled to sue him, until he has failed in procuring payment from the principal debtor, or that he has sued him for the whole amount of the debt when he ought also to have sued others who were joined with him as sureties. In the former case he excepts to the creditors' action, by insisting on the benefit of discussion, *beneficium excussionis*, and in the other case on the benefit of division, *beneficium divisionis*.

These are privileges to which sureties are entitled under the various systems of jurisprudence in Europe, in Louisiana, and in those British Colonies which adopt the law of France as it existed before, or has been since altered by the Code Civil, as in Lower Canada, St. Lucia, and the Mauritius, or the law of Holland prior to the Code Civil, as in the colonies of British Guiana, the Cape of Good Hope, and Ceylon, and the law of Spain retained in Trinidad.

There is another privilege to which the surety is entitled, namely, on payment of the debt to have a cession of all the creditor's actions, securities and remedies against the principal debtor, the "*beneficium cedendarum actionum.*" This privilege forms part of the jurisprudence of Europe.

CHAPTER I.

RIGHTS COMPETENT TO THE CREDITOR AGAINST THE SURETY.

On default by the principal, and a right of action against him by the creditor, he may proceed against the surety for the recovery of the debt.—The time for payment must have arrived.—Condition precedent must have been performed by the creditor.—Right of the creditor to full reimbursement.—The creditor's right may be qualified by the contract of the parties.—What recoverable from the surety in cases of proof against and receipt of dividends from the principal debtor.—No right to have the assets of a deceased surety set apart to answer what might thereafter be found due from the principal.

THE object of this contract is as the definition expresses the greater security of the creditor. "Curamus ut quod in obligationem diduxemus tutius nobis debeatur" (*a*). The surety is equally liable with the principal debtor.

As the surety is responsible only for the default of the principal, that default must have taken place and the creditor must have a right to sue the principal debtor before the surety can be made liable. "Fidejussor antequam reus debeat, convenire non potest" (*b*). The time therefore, for the payment by the principal of the debt, or for the performance by him of the act for which the surety became responsible, must have arrived. If any act is to be done by the creditor to the debtor before he could proceed against him, until that act is done he has no right of action against the principal, and therefore none against the surety (*c*).

(*a*) Dig. lib. 44, tit. 7, § 8.
(*b*) Ibid. 46, tit. 1.
(*c*) Hering. de Fidejuss. c. 22.

Non ante agi posse ex ea causa quam tempus præterisset, quo insula ædificari posset: nec fidejussores dati ante diem tenebuntur. Atque adeo fidejussionis præstitæ sub conditione dies non dicetur venisse, nec cessisse ante purificationem conditionis. Fidejussor conditionaliter accedens, non aliter tenetur quam si conditio adimpleatur (*d*).

The following cases illustrate these texts:—If the surety engage that his principal shall, from time to time, *when required so to do by the creditor*, duly account for all monies received by him, and that he shall pay any balance that may be due from him, the creditor, before he can compel the surety to pay anything, must proceed to take the account; for the surety is not bound beyond the terms of his contract, and is entitled to a strict performance of those terms (*e*).

If the surety engage to pay the debt of his principal at a subsequent day, if not then paid by the principal, *the same being reasonably requested of him*, a previous request by the creditor is necessary, before the creditor can render the surety liable (*f*).

The creditor must have a legal demand against the debtor. A. became bound, as surety, to pay all the advances which a banker should make to his principal; the advances were made by drafts which were prohibited by the Stamp Act (*g*), the surety is not liable for the amount of those advances, for the principal had incurred no legal debt to the banker (*h*). But if a trading, in respect of which the contract of surety was given, was not absolutely and at all events illegal, but was legal *sub modo*, that is, if

(*d*) Hering. de Fidejuss. c. 11, n. 197; c. 20, § 18.

(*e*) Antrobus *v.* Davidson, 3 Meriv. 569. Elworthy *v.* Maunder, 2 Moo. & P. 482. S. C. 5 Bing. 295. Pearce *v.* Morrice, 2 Ad. & Ell. 84. Ex parte Fairlie, Mont. 17. Holl *v.* Hadley, 2 Ad. & Ell. 758. Musket *v.* Rogers, 5 Bing. N. C. 728.

(*f*) Alcock *v.* Blowfield, Noy. 95.

(*g*) 55 Geo. 3, c. 184, s. 13.

(*h*) Swan *v.* the Bank of Scotland, 10 Bli. N. S. 627. S. C. 2. Mont. and A., 656.

the parties obtained a license from the Crown, under the order of council, to import the goods, and the license, if obtained, would render the purchase in France of such goods legal, as the original contract was free from any vice, the plaintiff was allowed to recover against the defendants as sureties for the due performance of the original contract, which the persons abroad had failed to perform (*i*). So where a trade was carried on in violation of the Excise Laws by the creditor, and which was prohibited under a penalty, it was held there was not that illegality in the contract which would prevent the vendor of the goods from recovering the price against the surety, upon non-payment by the principal (*i*).

A creditor is entitled to the benefit of all the securities which the principal debtor has given to his surety, as well as those which were given to the creditor by the principal (*j*). If the creditor has the security of a pledge, or fund, in addition to the personal responsibility of the principal and surety, the creditor is at liberty to proceed against the surety personally, without resorting in the first instance to the fund or pledge (*k*). He is not deprived of his right to resort to the surety, upon his personal security, because there has been provided a fund for the debt of the principal, to which the creditor might have recourse for payment; but when the surety has paid the debt of the principal to the creditor, the surety may compel the creditor to proceed against the fund or pledge for his benefit (*l*).

A writ of *ne exeat regno* had issued against the plaintiff, who had previously entered into the usual bond with sureties. He

(*i*) Timson *v.* Merac, 9 East, 35. Brown *v.* Duncan, 10 B. & C. 93.

(*j*) Maure *v.* Harrison, 1 Eq. Ca. Ab. 93, and see observations of Sir W. Grant, in Wright *v.* Morley, 11 Ves. 12.

(*k*) Folliott *v.* Ogden, 1 H. Blk. 123, and Lord Eldon's observations in Wright *v.* Simpson, 6 Ves. 714; but see Wright *v.* Nutt, 3 Bro. C. C. 326. S. C. 1 H. Blk. 136.

(*l*) Wright *v.* Simpson, ib.

afterwards went abroad, and an application was made by the creditor to the Court of Chancery, that the sureties might be ordered to pay into Court the sum for which the writ was marked, within six months, together with the costs of the application, and Lord Eldon, Chancellor, granted the application (*l*), although it was insisted by the sureties that the debt claimed by the applicant was on account, and was not then proved to be actually due, and that the principal had put in his answer, which had not been excepted to, and that he had gone abroad under a mistake as to the effect of his bond, the condition whereof he presumed to be satisfied by the putting in of his answer (*m*).

If the principal debtor has deposited with the creditor a bill of exchange, or promissory note, as a security for his debt, which the debtor has not indorsed, the Court of Bankruptcy will, on the bankruptcy of the depositor, and upon the petition of the creditor, order the assignees of the debtor to indorse the same, in order to enable the creditor to bring an action at law thereon, he undertaking not to bring an action or suit at law or in equity thereon against the bankrupt debtor or his assignees (*n*).

If there be an agreement between C. and D. that C. shall advance D. 1,000*l.*, upon receiving negotiable securities to that amount, and D. deposits with C. securities to the amount of 3,000*l.*, and C. afterwards advances D. money to the latter amount, and among the securities deposited by D. with C. is an accommodation bill, accepted by B. for 500*l.*, B. will not be liable to the creditor in respect of his accommodation bill, if the remaining securities in the hands of C. are sufficient to realize the sum of 1,000*l.*, to secure which amount was the specified

(*l*) Utten *v.* Utten, 1 Meriv. 51. Musgrave *v.* Medex, 1 Meriv. 49.
(*m*) Utten *v.* Utten, ib.
(*n*) Praed *v.* Gardiner, 2 Cox, 85.

purpose of the depositor (*o*); and upon payment by B. to C. of that sum, B. has a right to a transfer of those securities. If D. become bankrupt, B. has an equitable right to have the securities realised, and the proceeds applied to the liquidation of the 1,000*l.*, and he will be responsible to C. only for the unsatisfied balance, not exceeding the amount of his bill (*p*). If, however, the securities had been deposited with C. to secure any general balance owing to him from D., then C. would be entitled to claim from B. the full amount of his note (*q*), unless C.'s debt had been reduced by payments received from D. or his estate, so as to reduce the debt of C. below the amount of B.'s notes (*r*).

If the surety be liable to the creditor to a limited amount only, and the creditor gives credit to the principal debtor in a sum beyond that amount, if the creditor proves under the principal's bankruptcy, and receives dividends in respect of his whole demand, the dividends so received by the creditor will go in reduction, as well of the sum for which the surety is liable, as of the excess beyond that sum; and the creditor is not at liberty to apply the dividends so received by him in the reduction of that part of his demand for which the surety is not answerable, to the prejudice of those rights which the surety would have had, if the amount had not exceeded that for which the surety was liable; but the dividends will be applied rateably upon the whole debt, as well upon that for which the surety had engaged to be answerable, as upon that part which

(*o*) See Vanderzee *v.* Willis, 3 Bro. C. C. 21. Paley *v.* Field, 12 Ves. 434. Ex parte Vere, 2 Mont. & Ay. 123. S. C. 4 Deac. & Ch. 295.

(*p*) Ex parte Vere, 2 Mont. & Ay. 123. S. C. 4 Deac. & Ch. 295. Ex parte Brook *v.* Chatteris, 2 Rose, 334.

(*q*) Ex parte Sammon, 1 Deac. & Ch. 564, and see the judgment of Erskine, C. J., in Ex parte Vere, *supra*, and see Westzinthus *v.* Lapage, 5 B. & Ad. 817.

(*r*) Ex parte Sammon, *supra*.

the creditor had advanced without security (*s*). If A. and B. execute a joint bond to C. to secure the repayment to C. of all monies advanced by C. to A., and there is an express condition that B. shall not be liable for any greater amount than 1,000*l.*, and the creditor gives credit to B., the bankrupt, to the amount of 2,000*l.*, and a dividend of 10*s.* in the pound is received by C. under the commission issued against B., a moiety of the money so received by C. shall be considered to have been received by C. in respect of the 1,000*l.* for which the surety was liable, and consequently C. will only be entitled to recover against B. the sum of 500*l.* (*t*).

If the principal assign his effects to trustees, for the benefit of his creditors, *pro ratâ*, the same principle applies, and the dividends which the creditor receives must be applied by him rateably to the whole debt, as well the part to which the guarantee does, as the part to which the guarantee does not extend, for the payment is specially made by the trustees, and the creditor receives it as so much in each and every pound of the whole amount of the debt (*u*).

When a bond is given by the principal and his surety, conditioned for the payment of a sum of money by instalments, and the obligee proves for the whole debt under the fiat against the principal, and receives a dividend on the amount of such debt, the creditor is entitled to recover from the surety the several instalments as they became due, making a deduction in each instalment proportionate to the dividend; and the surety is not entitled to have the whole dividend applied in discharge of the instalments as they severally become due, to the extent of the dividend received, but only rateably in part payment of each instalment as it becomes due (*v*).

(*s*) Ex parte Turner, 3 Ves. 243. Ex parte Rushforth, 10 Ves. 409. Paley *v.* Field, 12 Ves. 435. Bardwell *v.* Lydall, 7 Bing. 489.

(*t*) Ex parte Rushforth, *supra*. Paley *v.* Field, *supra*.

(*u*) Bardwall *v.* Lydall, *supra*.

(*v*) Martin *v.* Brecknell, 2 M. & Sel. 39.

As a party who receives an indemnity can have no claim until he has been damnified, so neither can he, upon the insolvency of the party whose acts are the subject of the indemnity, call upon the representatives of the party who had given the indemnity, to set apart beforehand a sum of money out of the assets of such last mentioned party, to answer any demand that might be found to be due from the principal, on the settlement of accounts between him and the creditor (*w*).

(*w*) Antrobus *v.* Davidson, 3 Meriv. 569.

CHAPTER II.

RIGHTS COMPETENT TO THE SURETY AGAINST THE CREDITOR WHEN HE ENFORCES THE CONTRACT OF SURETYSHIP.

It has been observed in the commencement of this Book, that the rights of the creditor against the surety were qualified by the rights or privileges which the surety might claim against the creditor. They consisted of the *beneficium ordinis*, or *excussionis*, the *beneficium divisionis*, and the *beneficium cedendarum actionum*. It is proposed to consider each of these privileges, and the manner in which the law of England supplies relief correspondiug with them.

SECTION I.

BENEFIT OF DISCUSSION.

At one period in the history of the Roman law the creditor might have proceeded in the first instance against the surety for the whole debt.—The *beneficium ordinis* or *excussionis* introduced.—Must be insisted on by surety if he would avail himself of it.—When it cannot be claimed.—Renunciation, express, implied, general.—Absence of principal.—No property within the jurisdiction.—Code Civil.—Louisiana Code.—No action maintainable against principal.—Insolvency.—Law of Scotland.—Admitted in different Codes of Europe.—In certain British Colonies.—Law of England.

By the law of the Digest and Code, it was competent for the creditor, except in certain cases, to proceed against the

surety before he had resorted to the principal debtor. "Creditor pignus distrahere non cogitur, si fidejussorem simpliciter acceptum omisso pignore velit convenire." (*a*).

"Si fidejussor creditori denuntiaverit ut debitorem ad solvendam pecuniam compelleret, vel pignus distraherit, isque cessaverit: an possit eum fidejussor doli mali exceptione summovere? Respondit, non posse" (*b*).

"Jure nostro est potestas creditori, relicto reo, eligendi fidejussores: nisi inter contrahentes aliud placitum doceatur" (*c*).

"Si alienam, reo principaliter constituto, obligationem suscepisti, vel fidejussorio, sive mandatorio, vel quocumque alio nomine, pro debitore intercessisti: non posse creditorem urgeri, eum qui mutuam accepit pecuniam, magis quam te convenire, scire debueras; quum, hoc in initio contractus specialiter non placuit, habeat liberam electionem" (*d*).

The excepted cases were those of the surety for a collector of the public revenue, or for the payment of a debt to the fisc or for the due administration of a public office. In these cases it was required, that resort should be first had to the principal before the suit was instituted against the surety (*e*).

So from the very nature of the contract the surety might not become liable until the creditor had first proceeded against the principal debtor, and been unable to obtain from him the payment of the debt (*f*).

It is asserted by the Emperor Justinian that the old law required that in all cases the principal debtor should be first

(*a*) Dig. lib. 46, tit. 1, l. 51, § 3.
(*b*) Ibid. l. 62.
(*c*) Cod. lib. 8, tit. 41, l. 5.
(*d*) Ib. l. 19.
(*e*) Dig. lib. 49, tit. 14, § 3; lib. 50, tit. 8. Perez. ad Cod. lib. 8, tit. 4. Brunneman, ad Pand. lib. 46, tit. 1, l. 3. Pothier, ad Pand. ib. Wissenb. ad Just. Disp. 34.
(*f*) Dig. lib. 45, tit. 1, l. 116. Voet, lib. 46, tit. 1, n. 14. Lauterb. ad Pand. lib. 46, tit. 1, § 35.

discussed, and that this law had fallen into disuse or been disregarded.

Legem antiquam positam quidem olim, usu vero nescimus quemadmodum non approbatam, per causas autem semper exquisitas atque necessarias apparentem, rursus revocare, et ad rempub. reducere, bene se habere putavimus, non simpliciter, eam, sicut jacebat, potentes: (erat enim quædam ejus pars omnino non discreta) sed cum competenti et Deo placito distribuentes augmento (*g*).

It was the object of the fourth Novell to restore that law.

Si quis igitur crediderit et fidejussorem aut mandatorem aut sponsorem acceperit: is non primum adversus mandatorem, aut fidejussorem aut sponsorem accedat, neque negligens, debitoris intercessoribus molestus sit sed veniat primum ad eum qui aurum accepit debitumque contraxit: et si quidem inde receperit ab aliis abstineat, quid enim ei in extraneis erit, à debitore completo? Si vero non valuerit â debitore recipere aut in partem, aut in totum, secundum quod ab eo non potuerit recipere secundum hoc ad fidejussorem, aut sponsorem aut mandatorem veniat, et ab illo quod reliquum est, sumat: et si quidem præsentes ei consistant ambo, et principalis, et intercessor, et aut mandator aut sponsor, hoc omni servetur modo. Si vero intercessor, aut mandator, aut qui sponsioni se subjecerit, adsit, principalem vero abesse contigerit, acerbum est, creditorem mittere alio, cum possit mox intercessorem, aut mandatorem, aut sponsorem exigere. Sed et hoc quidem curandum est a nobis possibili modo non enim erat quoddam hic antiquæ legi datum pro sanatione remedium, quamvis "Papinianus maximus fuerit, qui hoc primitus introduxit. Probet igitur intercessorem, aut sponsorem, aut mandatorem, et causæ præsidens judex det tempus intercessori (idem est

(*g*) Coll. 1, tit. 4. Novell, 4. Poth. ad Pand. lib. 46, tit. 1, § 41. Rittersh. ad Novell, p. 3, c. 2, § 17, p. 145. Cujacius ad Novell, 4, tom. 2, p. 903, 904.

decere, sponsori et mandatori,) volenti principalem deducere: quatenus ille prius sustineat conventionem: et sic ipse in ultimum subsidium servetur: sitque solatio intercessori, (aut sponsori et mandatori) in hoc quoque judex: fidejussoribus enim et talibus prodesse sancitum est, ut illo deducto, interim conventione liberentur, qui pro eo in molestia fuerunt. Si vero tempus in hoc indultum excesserit, (convenit namque etiam tempus definire judicantem) tunc fidejussor, aut mandator, aut sponsor exequatur litem, et debitum exigatur contra eum pro quo fidejussit, aut pro quo mandatum scripsit aut sponsionem suscepit: à creditoribus actionis sibi cessis" (*h*).

Of the existence of this law doubts have been expressed by commentators (*i*).

Various appellations are given by commentators on the civil law to this privilege or benefit. It is not unfrequently called *beneficium ordinis.* "Quod cum nullo antea certo ordine integrum esset pro actoris lubitu, vel actionem ex stipulatu contra fidejussorem, vel alteram contra Reum sive debitorem principalem instituere, ita ut ille utra vellet experiri posset (*j*), hoc ipso beneficio indultum, ut creditores servato ordine in conveniendo progredi, et unam actionem post alteram instituere debeant" (*k*).

Its more frequent and perhaps appropriate appellation is *beneficium excussionis* (*l*). The term *excussio* denotes *inquisitio* and *exactio.* "Creditor enim prius principalem debitorem excutere, id est, illum convenire, in bona illius, sufficientia

(*h*) Novell, 4, c. 1.

(*i*) Rittersh. ad Novell, p. 3, c. 2, § 17, p. 145. Poth. ad Pand. lib. 46, tit. 1, § 41. Cujacius ad Novell, 4, tom. 2, p. 903, 904. Cicero Epist. ad Atticum, lib. 12, 16.

(*j*) Cod. lib. 8, tit. 4, l. 2, 3, 5, 16, 21. Biccius, sect. 4.

(*k*) Lauterbach, Disp. 15, Th. 4, n. 3, p. 472. Hering. Tr. de Fidejus. c. 27, Part 1, n. 18.

(*l*) Ibid. Hering. Tr. de Fidej. c. 27, p. 1.

sint, inquirere, et ab ipso debitum exigere debet, ante quam ad fidejussores, et similes veniat, et ab illis aliquid petat" (*m*).

"Excussio sit bonorum atque rerum principales debitores usque ad saccam et peram per judicem facta discussio inquisitio et detectio." The law of Spain adopts a similar expression. In the law of France and Scotland its import is expressed by the term *discussion*.

But this provision, that the creditor shall first proceed against the principal, and discuss him, is a privilege of which the surety is to avail himself. It does not prevent the creditor from suing and even proceeding to judgment and execution against the surety, unless the latter claims this privilege by exception (*n*). "Procedit autem ista regula eatenus, si fidejussor conventus à creditore, exceptionem ordinis seu discussionis in judicio ante litis contestationem opposuerit: aliàs omissa ista exceptione, judicium contra fidejussorem procederit."

Hoc ipso autem excussionis beneficio rei minus principales supra enumerati, ab actionibus, quæ contra illos competunt, non ipso jure, sed tantum ope exceptionis liberantur. Possunt enim adhuc fidejussores et similes rei minus principales etiam ante reos principales ipso jure conveniri; et creditores, debitoribus principalibus nondum excussis, adversus fidejussores et similes agentes, non nulliter, sed tantum male, immature, et præpostere agunt. Justinianus *in Nov.* 4, *c.* 1, *et* 2, actiones contra intercessores, et tertios rerum hypothecatarum possessores communi jure competentes, non extinxit, sed tantum modum et ordinem exactionis præscripsit: creditor enim hoc in casu non agit sine, actione; et debitor minus principalis hanc exceptionem opponendo, non negat intentionam actoris, et actionem ipso jure competere; sed hoc saltem dicit, se prin-

(*m*) Lauterb. Disp. 15, Th. 3, n. 4, p. 482. Hering. ib. c. 27, p. 1.
(*n*) Gail. Tr. Ob. lib. 2, Obs. 27.

cipali debitore nondum excusso, condemnari, iniquum, et principalem prius excutiendum esse (*o*).

But the surety may not be entitled to insist on this privilege, in consequence of his having renounced it. Quilibet potest Juri pro se introducto renunciare. A renunciation is said to be "stricti Juris," and is not to be presumed. It is to be expressed, unless indeed it can be necessarily implied from the terms in which his engagement as surety is expressed, as where he obliges himself, "*tanquam principalem.*" In the writings of many jurists, and amongst them J. Voet (*p*), it is said that a general renunciation of all privileges is not sufficient; but the better opinion seems to be, that where the renunciation is expressed to be of all privileges competent to sureties, it extends to this as well as the other privileges on which the surety would be otherwise entitled to insist.

Quod si vero verba sint generalia subalterna, tunc aliud, quam in præcedenti casu, est dicendum. Dicuntur autem subalterna, quod diversis respectibus nunc specialium, nunc vero generalium verborum naturam assumant.

Sic beneficium est genus generalissimum, Beneficium fidejussoribus competens genus est subalterum, ita quidem, ut si ad beneficium in genere referatur, loco speciei sit habendum, sin vero ad singula beneficia fidejussorum respiciat, generis quodammodo locum occupet.

Ponamus igitur fidejussorem ita renuntiare: Renuntio beneficiis fidejussoribus competentibus, vel, Renuntio omni juris ac legum auxilio pro me facienti. Hoc sane casu sublatum censetur beneficium excussionis, divisionis, necnon cedendarum actionum.

Nam sufficit, quod species privilegii exprimatur secundum suam speciam, non autem secundum suam singularitatem (*q*).

(*o*) Lauterb. Disp. 15, Th. 45.

(*p*) Voet, lib. 46, tit. 1, n. 16.

(*q*) Hering de Fidej. 17, n. 45, c. 27, p. 1, n. 186, *et seq.*, and the numerous authorities cited.

Vander Kessel also concurs in this opinion. Beneficia fidejussorem non modo specialiter, sed et generaliter renunciari posse juris ratio docet, sive juris peritus simpliciter renunciaverit, sive imperitus ea sibi cognita fuisse generaliter declaraverit (*r*).

This privilege cannot be claimed if the principal debtor be absent, or has not within the time appointed by the judge been arrested for the purpose of being first proceeded against (*rr*).

The principal debtor is said to be absent when the creditor has not the power of suing him, not only by reason of his being corporeally absent, but because he has left no attorney to represent him, or no property or assets of which the creditor may obtain possession or on which might be founded the jurisdiction of the Court (*s*).

When therefore, the creditor is unable to proceed by suit against the principal debtor, this privilege cannot be claimed by the surety. This disability might be caused by the absence of the creditor from the country. Si vero intercessor, aut mandator, aut qui sponsioni se subjecerit, adsit: principalem vero abesse contigerit, acerbum est, creditorem mittere alio, cum possit mox intercessorem, aut mandatorem, aut sponsorem exigere (*t*).

In this case upon proof of the absence of the debtor the Court appointed a time within which the surety was to procure his appearance, and when that time had elapsed and the debtor did not appear it was competent for the creditor to proceed against the surety. Sed et hoc quidem curandum est a nobis possibili modo: non enim erat quoddam hic antiquæ legi datum pro sanatione remedium: quamvis Papinianus maximus furerit, qui hoc primitus introduxit. Probet igitur intercessorem aut sponsorem, aut mandatorem: et causæ

(*r*) Thes. 349.
(*rr*) Novell, 4. Berlich. Conclus. Pract. 2, Conc. 24, n. 35.
(*s*) Voet, ib. Groeneweg. ad Cod. lib. 8, tit. 41.
(*t*) Novell, 4, tit. 4, c. 1.

præsidens judex det tempus intercessori (idem est dicere, sponsori et mandatori) volenti principalem deducere: quatenus ille prius sustineat conventionem: et sic ipse in ultimum subsidium servetur: sitque solatio intercessori, [aut sponsori et mandatori] in hoc quoque judex; fidejussoribus enim et talibus prodesse sancitum est, ut illo deducto, interim conventione liberentur, qui pro eo in molestia fuerunt. Si vero tempus in hoc indultum excesserit, (convenit namque etiam tempus definire judicantem) tunc fidejussor, aut mandator, aut sponsor exequatur litem, et debitum exigatur contra eum pro quo fidejussit, aut pro quo mandatum scripsit, aut sponsionem suscepit, à creditoribus actionis sibi cessis" (*u*).

The ground on which the privilege is denied being the inability of the creditor to institute a suit, the debtor cannot be said to be absent if he is represented by a procurator or attorney, or if he has property within the jurisdiction of which the Court may take possession (*v*).

According to the forms of proceeding in France, the notice and service at the place of the domicil of the debtor has the same effect as personal service (*w*).

If, therefore, he were amenable to the jurisdiction of the Court, and the action could proceed against him, the surety was not deprived of this privilege.

This privilege cannot be claimed, if the debt for which the surety had engaged be that for which no action could be maintained against the principal debtor, "Beneficium excussionis cessat si principalis debitor à creditore conveniri nequeat."

(*u*) Novell, 4, tit. 4, l. 1. Berlich. Concl. 2, Pract. 2, Conc. 24, n. 35. Gaill, lib. 2, Obs. 27, n. 35.

(*v*) Dig. lib. 42, tit. 4, 5. Voet, lib. 46, tit. 1, n. 18. Mantica, de Tacit et Ambig. Convent. l. 16, tit. 16, n. 2. Fab. Cod. lib. 8, tit. 24, def. 23. Grotius, Introd. l. 3, p. 3. Groeneweg. ad Cod. lib. 8, tit. 41.

(*w*) Loyseau, des Rentes, c. 9, n. 17, 18, *et seq.* Pothier, Tr. des Oblig. Part 2, c. 6, § 3, n. 410.

A surety for a minor, who has contracted without the authority of his guardian, and who could not therefore be sued, could not claim this privilege, for he is, in fact, himself a principal debtor (*x*).

Neither can the surety claim it if he has received the debt from the debtor, or is in possession of property belonging to the debtor from which he might discharge the debt (*y*); or if he has obstructed or prevented the creditor from discussing the principal debtor (*z*). If the surety takes upon himself the debt of the principal *animo novandi*, if there has been a novation of the debt by its transfer to and acceptance by him, he ceases to become a surety, but thereby becomes the principal debtor, and therefore can not claim this privilege (*a*). Neither can it be claimed if the surety succeeds to the debtor as heir, for then he is sued, not as the surety, but as the debtor (*b*).

In respect of the purpose for which the security is granted, this privilege may not exist. The persons who give caution for a defendant in a suit, either that *de sistendo*, or that *de judicato solvendo*, are not entitled to the benefit of this exception (*c*). The terms in which the contract is expressed may exclude or be in effect a tacit renunciation of this privilege. Thus, if the

(*x*) Voet, ib. Lauterb. Disp. de Beneficio Excussionis, lib. 14, Th. 14. Hering. de Fidejuss. c. 27, n. 160. Gaill, Obs. lib. 2, Obs. 27, n. 20.

(*y*) Lauterb. ad Pand. lib. 46, tit. 1, § 39. Voet, ib. n. 48. Hering. de Fidejuss. c. 27, n. 264.

(*z*) Berlich. Conclus. Pract. 2, Conclus. 24, n. 35. Voet, ib. n. 18.

(*a*) Hering. de Fidejuss. c. 27, n. 250. See Novation, *ante*, p. 168.

(*b*) Ibid. n. 261. See Confusion, *ante*, p. 253.

(*c*) Dig. lib. 2, tit. 8; lib. 46, tit. 5, l. 1, l. 119, l. 9. Voet, lib. 46, tit. 5, n. 16. Fab. Cod. lib. 8, tit. 28, def. 9. Berlich. p. 3, Conclus. 24, n. 125. Louet. Lit. F. Resp. Jurisc. Holl. p. 3, vol. 2, Concil. 18, n. 1. Groeneweg. ad Cod. lib. 7, tit. 54, l. ult. § 1. Zoes. ad Pand. lib. 46, tit. 1, n. 20. Sande de cess. act, c. 6, n. 38. Carpz. Def. For. p. 2, const. 17, def. 1. Pothier, Tr. des Oblig. p. 2, c. 6, n. 409. Code Civil, Art. 2042, 2043.

surety undertake expressly as a principal debtor, he is considered to have renounced it (*d*).

The surety, by virtue of this exception, is entitled to insist that the creditor should first discuss the property which has been pledged to him by the principal debtor for the debt, whether that property be in his own possession or in that of a third party (*e*).

Under the present law of France, the surety to entitle himself to insist on the previous discussion of the principal debtor, must point out to the creditor property of the debtor, on which the latter can levy. "La caution qui réquiert la discussion doit indiquer au créancier les biens du débiteur principal et avancer les deniers suffisants pour faire la discussion.

"Elle ne doit indiquer ni des biens du débiteur principal situés hors de l'arrondissement de la cour royale du lieu où le paiement doit être fait, ni des biens litigieux, ni ceux hypothéqués à la dette qui ne sont plus en la possession du débiteur" (*f*).

The Civil Code of Louisiana contains a similar provision. "The surety, who does require the discussion, is bound to point out to the creditor the property of the principal debtor, and furnish a sufficient sum to have the discussion carried into effect.

"The property of the principal debtor which he points out must not be situated out of the State, nor be in litigation, nor in mortgage for the debt, and no longer in the possession of the debtor" (*g*).

(*d*) Gaill, lib. 2, Obs. 28, n. 2, 3, 6. Christ. ad Leg. Mechl. tit. 7, Art. 15, n. 2. H. Grotius Manud. ad Jurisp. Holl. lib. 3, c. 5, n. 54. Voet, lib. 46, tit. 1, n. 16. Fach. Controv. lib. 8, c. 54. Berlich. Conclus. Pract. lib. 2, concl. 23, n. 4. Basnage, Tr. des. Hypoth. 532.

(*e*) Voet, lib. 46, tit. 1, n. 15. Lauterbach, disp. 82, Th. 20. Basnage, Tr. des Hypoth. 529. D'Espeiss, tom. 1, p. 615, p. 2, tit. 2, § 3, des Cautions.

(*f*) Code Civil, Art. 2023.

(*g*) Louisiana Code, Art. 3016. Delazerry *v.* Blanquis Syndics, 6 Martin's Rep. 560. Herries *v.* Canfield, 8 Martin's Rep. 389.

In Scotland the privilege is admitted, but it cannot be insisted on if the principal debtor be absent from that kingdom, and has no effects within the jurisdiction of the Court (*h*).

As the *beneficium excussionis* is intended not to impair the security of the creditor, but to oblige him to seek payment in the first instance from the principal debtor, it could not benefit the surety, and must be injurious to the creditor to sue the debtor, if he were insolvent, or had no property subject to the jurisdiction of the Court which might have given judgment. Hence, the creditor may, in the first instance, proceed against the surety, if the debtor be insolvent, or has no property that can be taken in execution (*i*).

The insolvency of the debtor may be notorious, or he may have made a cession of his effects, or his conduct may afford proof of his insolvency (*j*).

But when there is no such proof of the insolvency, the creditor, who would deprive the surety of this privilege, must prove that the debtor has no property (*k*).

In Scotland, if the principal or his representative be in the kingdom, it is necessary that the creditor, in order to deprive the surety of this privilege, should shew that the principal has

(*h*) Elams *v.* Fisher, Dec. 7, 1757, Dict. 2110. Wishart *v.* Wishart, 1837, 2 Sh. & M'Lean, 584.

(*i*) Lauterb. Disp. 15, n. 40, *et seq.* Thes. 43. Dig. lib. 2, tit. 8, l. 2. Carpz. def. Const. 18, def. 14, 15. Hering. ib. n. 243. Berlich. p. 2, conc. 24, n. 20, 24. Strych. c. 3, n. 40. Lauterb. ad Pand. lib. 46, tit. 1, § 37, n. 138. Mynsinger. cent. 2, Obs. 27, n. 14, *et seq.* 24, n. 21, et 138. Respon. Jurisc. Holl. p. 2, cons. 60, et 239. Voet, lib. 46, tit. 1, n. 17.

(*j*) Lauterb. Coll. ad Pand. tit. de cess. Bon. § 18. Lauterb. Disp. 83, Th. 22, n. 14. Gail, lib. 2, Obs. 27, n. 14, *et seq.* Carpz. p. 2, Const. 18, def. 15.

(*k*) Carpz. p. 2, Const. 18, def. 15, lib. 2, tit. 6, Respons. 71. Berlich. Part 2, conclus. 24, n. 143, *et seq.* Lauterb. Disp. 15, Th. 43.

no moveable or immoveable property which can be taken in execution (*l*).

All the property of the debtor, corporeal and incorporeal, moveable and immoveable, is subject to be discussed "usque ad ultimum quadrantem" (*m*), "usque ad peram et succulum"(*n*), "ad ultimum obolum" (*o*), except, indeed, the raiment with which he daily clothes himself (*p*).

The preceding account of the cases in which this privilege is competent to the surety, as well as the manner in which the discussion of the principal debtor's property is to be made, represents the law of the several States of Europe, and of those colonies in which this privilege is admitted.

This privilege seems not to have been admitted in *foro mercatorio*, and Gaill assigns as the reason, "quod inter mercatores non habeat locum exceptio excussionis, quæ est de apicibus juris: quia in foro mercatorum summarie, de plano, et de æquitate, non inspectis juris apicibus proceditur" (*q*).

But in the present jurisprudence of Europe, where this privilege is recognised, it is admitted no less *inter mercatores* than between other parties (*r*).

In the writings of the earlier jurists various other cases are mentioned, in which this privilege is not allowed. Enumeratis hactenus casibus, quibus cessat ordinis beneficium, plures alii a doctoribus addi solent; veluti si quis jurato intercesserit;

(*l*) Arnot, 12 Feb. 1623, Dict. 2587. Milne, Jan. 15, 1685, Dict. 3588. Gaill, Dec. 6, 1748, Dict. 3589. Wishart *v.* Wishart, 2 Sh. & M'Lean, 584.

(*m*) Wissenb. De cess. Bon. 4.

(*n*) Bachov. ad. § 37. Inst. de Action, Trentl. vol. 2, c. 24, Th. 4, 554.

(*o*) Berlich. p. 1, concl. p. 2, 80.

(*p*) Ibid.

(*q*) Gaill, lib. 2, Obs. 27, n. 27.

(*r*) Pardess. de Droit. Commerc. Part 3, tit. 7, c. 2, n. 587. Ritchie, July 30, 1639, Bro. Supp.

vel pro ecclesia, vel principe, vel fisco, vel actione reali, fidem interposuerit, si principalis litigiosus, rixosus, cavillosus sit, vel potens, vel clericus, vel scholaris, vel alias conventu difficilior; si causa summarie ex bono et æquo sit decidenda, vel inter mercatores; si debitor in mora jam constitutus decesserit; si ad fugam sese paret; si creditum non ad debitorem non inveniant; si creditum non ad debitorem, sed ipsum fidejussorem pervenerit; si fidejussor promiserit, se confestim, quantocius, soluturum, quæ omnia cum pluribus aliis dubia satis ac ambigua, imo erronea magna ex parte, videri possunt prolixius disceptare (*s*).

But these do not seem to have been admitted by the law of Holland, nor in the jurisprudence of other parts of Europe (*s*).

This privilege is admitted by the law of Scotland.

It was part of the law of France before the Code Civil. It forms an article of that Code, and of the different Codes of Europe, and in the State of Louisiana (*t*). It prevails in British Guiana, Lower Canada, the Mauritius, the Cape of Good Hope, Trinidad, St. Lucia.

In Pennsylvania it has been decided that the creditor is bound to sue the principal when required by the surety and the debt is due, and that when proper notice is given by the surety, that unless the principal be sued he will consider himself discharged, he will be so considered unless the principal be sued (*u*).

The jurisprudence of England, and of those colonies which adopt it, does not, in that part of it which administers strict law as distinguished from equity, give this privilege to the surety. But in the administration of that part which is called Equity, and in the administration of the Bankrupt Laws, a

(*s*) Berlich. D. Par. 2, conclus. 24, ab initio usque ad. n. 142. P. Maur. de Fidejussor, par. secund. princ. sect. 6, c. 3, n. 43. Hering. de Fidejuss. c. 27, n. 186, *et seq.* Voet, lib. 46, tit. 1, n. 19.

(*t*) Poth. Tr. des Oblig. p. 2, c. 6, Art. 2.

(*u*) 8 Serge & Rawl. 116. 15 Ibid. 29, 30.

relief similar in its effects is afforded to him. It treats the creditor, however, as entitled to avail himself of all his securities in order to obtain the full payment of his demand. Thus, if the creditor have both a personal remedy against the surety for his demand, and also a fund to which he may resort for payment, and to which fund the surety, even when he has paid the creditor what is owing to him, cannot resort, a Court of Equity will, when it is satisfied that the creditor has the clear means of making his demand effectual against the fund, and upon the surety's indemnifying the creditor against the consequences of all risk, delay, and expense, compel the creditor to make the fund available towards satisfaction of his debt before he proceeds personally against the surety (*u*). So if property belonging to the principal, and property belonging to the surety respectively, have been deposited with the creditor as a security for his debt, the surety, it would seem, may in equity, upon offering to pay the creditor what shall be found to be justly due to him upon taking the accounts between him and the principal, insist upon the property of the principal being first applied in satisfaction of the creditor's debt (*v*).

(*u*) Cottin *v.* Blane, 2 Anstr. 544, and see the observations of Lord Eldon, C., in Wright *v.* Simpson, 6 Ves. 714, in Ex parte Kendall, 17 Ves. 514. S. C. 1 Rose, 71; and in Aldrick *v.* Cooper, 8 Ves. 382, and of Lord Thurlow, C., in Wright *v.* Nutt, 3 Bro. C. C. 326.

(*v*) Aguilar *v.* Aguilar, 5 Madd. 414. Clinton *v.* Hooper, 1 Ves. jun. 173. S. C. 3 Bro. C. C. 201.

SECTION II.

BENEFIT OF DIVISION.

The *beneficium divisionis*.—Its origin.—Its object.—When from the nature of the contract not claimable.—That the co-surety must be liable, must be solvent, and capable of being sued, and the subject capable of division.—Effect of insolvency of a co-surety.—One of the co-sureties a minor.—Countries in which this privilege is admitted.—Code Civil.—Scotland.—Not admitted in England.

At an earlier period of the Roman law if several persons had joined as sureties, each was considered bound *in solido*, and it was competent for the creditor to sue any one of them for the whole debt. But a relaxation of this rule was afforded by the Emperor Hadrian, by whose letter the privilege was given that any one of them might insist that the creditor should divide the obligation amongst all of them who were solvent. "Si plures sint fidejussores: quotquot erunt numero, singuli in solidum tenentur. Itaque liberum est creditori, à quo velit, solidum petere. Sed ex epistola divi Hadriani compellitur creditor à singulis, qui modo solvendo sunt litis contestatæ tempore, partes petere. Ideoque si quis ex fidejussoribus eo tempore solvendo non sit, hoc cæteros onerat. Sed si ab uno fidejussore creditor totum consequutus fuerit: hujus solius detrimentum erit, si is, pro quo fidejussit, solvendo non sit: et sibi imputare debet, cum potuerit juvari ex epistola divi Hadriani, et desiderare, ut pro parte in se detur actio" (*a*).

This privilege was also confirmed by Severus and Antoninus. "Sed cum duos fidejussores accepisse te proponas: si alter idoneus est, intelligis te divisa quantitate partem competentem a procuratore [nostro] petere debere, et adversus alium fide-

(*a*) Inst. lib. 3, tit. 21, § 4. Cod. lib. 4, tit. 18, l. 3. Wissenb. ad Inst. lib. 3, tit. 20, l. 3. Foster, Hist. J. Civ. lib. 2, c. 73. Cujac. Obs. 22. Voet, lib. 46, tit. 1, n. 21. Poth. ad Pand. lib. 46, tit. 1. Lauterb. Disp. 14.

jussorem [ejus] experiri. Nam licet significes adjectum esse in obligatione, *ut singuli in solidum tenerentur:* tamen nihil hæc res mutat conditionem juris et constitutionem. Nam et cum hoc non adjiciatur, singuli tamen in solidum tenentur: sed ubi sunt omnes idonei, in portionem obligatio dividitur" (*b*).

The obligation must not import or express an undertaking to be separately or individually liable for the whole, as by the expressions, "*se solidum soluturum vel se in solidum obligaverit, ut principalem, et unus pro omnibus;* ne verba videantur frusta apposita et otiosa, licet de jure Saxonico contrarium teneatur; et alii demum hoc admittunt, si formulæ superiori verbum *indivisim*, aut æquipollens, adjectum sit" (*c*). But the expression by the sureties, "*ut se obligassent in solido,*" does not constitute a liability by each to pay the whole. It simply imports the legal effect of the obligation (*d*).

This privilege is not admitted unless they are sureties for the same debt or obligation, and for the same debtor or contractor. If two joint debtors procure each a separate surety for the payment of the debt, the surety of the one cannot insist on the principal resorting to the surety of the other for his part of the debt (*e*).

The surety for a surety cannot insist that the action should be divided between himself and him for whom he is surety, because the latter, in respect to the person who became his

(*b*) Cod. lib. 8, tit. 41, l. 3.

(*c*) Voet, lib. 46, tit. 1, n. 24.

(*d*) H. Grotius, Manud. ad Jur. Holl. lib. 3, c. 3, n. 54. Carpz. def. for. p. 2, const. 17, def. 19. Matth. de Oblig. Disp. 31, n. 9. Zanger de Except. Par. 3, c. 19, n. 3. Cod. lib. 8, tit. 41, l. 3. Groeneweg. ad Cod. lib. 8, tit. 41. Voet, lib. 46, tit. 1, n. 24. Lauterb. Disp. 14, Th. 11. Vinn. Sel. Quæst. tit. 11, c. 40. Basnage, Tr. des Hyp. p. 533. Pothier, Tr. des Oblig. p. 2, c. 6, n. 4, 16. Code Civil, Art. 2025, 2026. Louisiana Code, Art. 3018.

(*e*) Ibid.

surety, is as a principal debtor, and a debtor cannot of course have any right to insist on the surety being resorted to (*f*).

The following definition of this privilege is given by an eminent jurist:—"Privilegium certis debitoribus in solidum obligatis concessum, ne ab uno solidum, sed a singulis præsentibus et tempore litis contestatæ solvendo existentibus viriles portiones exigantur" (*g*).

This privilege can only be claimed if the co-sureties at the time of the "*contestatio litis*" were solvent. If, therefore, either of the co-sureties should at that time be insolvent, the others must pay the whole debt. But if being solvent at that time, they afterwards become insolvent, the co-surety is not deprived of the benefit of this privilege, but the loss falls on the creditor.

This doctrine prevailed in France before the Code Civil. "Néanmoins chacune d'elles peut, à moins qu'elle n'ait renoncé au bénéfice de division, exiger que le créancier divise, préalablement son action, et la réduisse à la part et portion de chaque caution."

"Lorsque, dans le temps où une des cautions a fait prononcer la division, il y en avait d'insolvables, cette caution est tenue proportionellement de ces insolvabilités; mais elle ne peut plus être recherchée à raison des insolvabilités survenues depuis la division" (*h*).

As the solvency of the co-sureties is the foundation of the surety's privilege, and must be alleged by him in his exception, the proof of such solvency rests on and must be established by him (*i*).

This privilege cannot be claimed where the co-surety is absent from the kingdom (*j*).

(*f*) Dig. lib. 46, tit. 1, l. 27, § 4. Voet, lib. 46, tit. 1, n. 22.

(*g*) Lauterbach, Disp. 14, Th. 2. Inst. lib. 3, tit. 21, §. 4. Dig. lib. 46, tit. 1, l. 28. Cod. lib. 8, tit. 41, l. 10. Hering. de Fidej. c. 27, p. 2.

(*h*) Pothier, Tr. des Oblig. ib.

(*i*) Voet, lib. 46, tit. 1, n. 21.

(*j*) Pothier, Tr. des Oblig. p. 2, f. 6, § 3, 424.

It may no longer be claimable because it has been renounced.

It cannot be claimed if the subject for which the surety engages is incapable of division, as is an obligation for the performance of a work, unless indeed it were part of the contract that a sum of money should be paid in case the work was not performed, or where the obligation is given under a penalty. "Fidejussores qui se ad factum aliquod obligarunt beneficio divisionis non gaudent, cum factum individuum pro parte præstari nequeat. Nisi forté factum fuerit promissum sub hac conditione: *Si non fuerit factum, pecuniam dare oportere.* Ut enim hoc casu stipulatio aptè dividitur. Ita etiam solutionem rectè dividi existimaverim, cum pecunia partis practationem bene, et commodè recipiat" (*k*).

This privilege is not allowed in a suretyship by several for *one* guardian, "rem pupillæ salvam fore," but if there was more than *one* guardian the privilege would be allowed. "Ille enim pupillo (non aliis majoribus natu) agente, ut dividatur actio, impetrare non possunt, propterea, quod pupillus ipse non contraxit, sed in tutorem incidit, et ignorat omnia, atque, ideò beneficium dividendæ actionis illi obesse non oportet, ne ex una tutelæ causa plures ac variæ quæstiones apud diversos judices constituantur."

"At ubi ab uno tutore plures fidejussores sunt dati, tunc illi beneficium divisionis non habent, idque favore pupilli" (*l*). Neither can it be claimed if the co-surety was not liable to be sued, as when he was a minor, or the surety a woman. If, of the co-sureties, the one who was of full age had first become surety, and the minor subsequently joined as a surety, the former must be considered the only surety, and there can be no division as he is solely liable (*m*). But if the minor had become

(*k*) Hering. de Fidejuss. c. 27, p. 2, n. 94, *et seq.*
(*l*) Hering. ib.
(*m*) Hering. ib. n. 68.

surety at one and the same time with himself, the one of full age would be liable only for his part. "Si major 25 annis solus ab initio fidejusserit pro alio, deinde minor ex intervallo, minor subducitur per restitutionem in integrum, major tenetur in solidum; quia et ab initio se obligavit in solidum; nullum sperans se habere participem ejus obligationis." Ut si simul fidejusserent, major et minor, major tenetur pro parte tantum, recessa intercessione minoris" (*n*).

The persons who have joined as sureties in a judicial security cannot claim this privilege (*o*). The object of this security would be defeated if the execution of the judgment could be delayed or obstructed by this exception, such is the reason assigned by jurists for excluding the privilege in this case (*p*).

This privilege formed part of the law of Holland before the introduction of the Code Civil (*q*), and the other foreign States of Europe. It is therefore admitted by the law prevailing in British Guiana, Ceylon, and the Cape of Good Hope.

It is admitted by the law of Spain, and in force in Trinidad (*r*).

It was admitted also by the law of France before the Code Civil (*s*), and consequently is adopted in Lower Canada and St. Lucia.

It is admitted by the Code Civil and is part of the law of Mauritius (*ss*).

In Scotland, if there be more than one cautioner, bound jointly and severally, the creditor may demand the debt from

(*n*) Ibid. n. 69.

(*o*) Voet, lib. 2, tit. 8, n. 16. Fab. Cod. lib. 8, tit. 28, def. 9. Resp. Jur. Holl. p. 3, vol. 2, cons. 18. Groeneweg. ad Cod. lib. 7, tit. 54, § 3. Basnage, Tr. des Hypoth. 537. Pothier, Tr. des Oblig. p. 2, c. 6, n. 417.

(*p*) Hering. de Fidejuss. c. 27, p. 2, n. 68, 69.

(*q*) Voet, lib. 46, tit. 1, l. 21. Grot. Inst. lib. 3, s. 28, 29.

(*r*) Partid. 5, lib. 12, l. 8, 9, 10.

(*s*) Pothier, Tr. des Oblig. p. 2, c. 6, Art. 3.

(*ss*) Code Civil, Art. 2025, *et seq.*

any of them, on assigning his remedy against the principal and the other cautioners. Or, after drawing from the principal debtor what he can, he may claim the balance from any of the cautioners so bound. If when the cautioners are bound simply as cautioners, they enjoy this privilege, but the insolvency of one would deprive them of this privilege (*t*).

No such privilege exists in the jurisprudence of England or in the West India Colonies adopting it.

Neither is it admitted in any of the States of America, except Louisiana.

SECTION III.

CESSION OF ACTIONS.

Privilege.—What.—When to be claimed.—On what terms.—Before or at the time of payment.—Right to the cession of the creditors securities.—Effect of insolvency of one of the co-sureties.—Manner in which the loss is to be divided.—States of Europe in which this privilege prevails.—Code Civil.—Law of Scotland.—The relief administered by a Court of Equity in England.

ANOTHER privilege which may be claimed by the surety against the creditor is the *beneficium cedendarum actionum*. Being ready to pay the creditor, the surety is entitled to require from him a cession of all his actions against the co-sureties, the principal, and against those holding pledges, when the security given to the debtor consisted of pledges as well as sureties. "Creditori, qui pro eodem debito, et pignora et

(*t*) 1 Bell's Commentary, 348. Stair, b. 1, tit. 17, § 6. Ersk. b. 3, tit. 3, § 61.

fidejussorem accepit, licet, si malit, fidejussorem convenire in eam pecuniam, in qua se obligaverit; quod cum facit, debet Jura pignorum in cum transferre"(*a*).

"Fidejussoribus succurri solet ut *stipulator* compellatur ei qui solidum solvere paratus est, vendere cæterorum nomina"(*b*).

The payment of part of the debt does not entitle the surety to insist on this privilege. "Parte debiti tantum per unum soluta, licet illa virili parte major sit, non posse peti per solventem, sibi actiones cedi contra confidejussores in id, quod supra suam partem præstitit, sive debiti integri exigenti jus jam creditori competierit, sive partis solutio ex die adhuc delata sit dum forte annua, bima, trima die debebatur principaliter, et anno primo lapso fidejussor unus pensionis illius solutionem fecit; cum utique absurdum esset, ad cessionem actionum et cautionis seu chirographi traditionem cogi creditorem, qui adhuc ipse ex eo secundæ tertiæ que pensionis exsolutionem persequi debet, uti iniquum videbatur, cedi jus pignoris, quod adhuc in aliam causam obligatum erat"(*c*).

Neither can he insist on the transfer of any pledge or security, if it were given for any other debt than that for which he became surety, unless he also discharged that debt.

"Sed cum in alia quoque causa eadem pignora vel hypothecas habet obligatas, non prius compellandus est transferre pignora, quam omne debitum exsolvatur (*d*).

"Si creditor pignoribus quoque sibi caverit, præsente solutione, ea in fidejussorem transferre tenetur (*e*), quod procedit, si eadem pignora non sint in aliam summam, vel in aliud quam

(*a*) Cod. lib. 8, tit. 41, l. 2.

(*b*) Dig. lib. 46, tit. 1, l. 17.

(*c*) Voet, lib. 46, tit. 1, n. 27. Carpz. def. for. Part. 2, const. 17, def. 22. Hering. de Fidejus. cap. 27, p. 3, n. 18. Sande de Cessione Act. 6, n. 35, 36.

(*d*) Cod. lib. 8, tit. 46, l. 2.

(*e*) Lauterb. ad dig. lib. 46, tit. s. 54.

à fidejussore dissolvitur debitum, sint obligata hoc enim ad creditoris injuriam respicerit qui transferendo ea, pignorum persecutionem amittit, eapropter creditor prius pignora transferre compellendus non est, quam omne debitum, omnisque pecunia, ac sic etam ea pro qua non fidejussit, à fidejussore exsolvatur" (*e*).

The cession of the creditor's actions and securities ought to be made by the surety before the debt is paid. "Ut (*f*) fidejussor adversus confidejussorem suum agat, danda actio non est: ideoque, si ex duobus fidejussoribus ejusdem quantitatis, cum alter electus à creditore totum exsolvet, nec ei cessæ sint actiones: alter nec à creditore, nec à confidejussore, convenitur." "Si enim post solutum sine ullo pacto totum, quod debebatur, actiones post aliquod intervallum cessæ sint, nihil ea cessione agitur, cum nulla actio ultra supersit, solutione extincta (*g*)."

But if, *on* or before making the payment, he requires the cession, and, consequently, the payment is made in consideration of such cession, in this case the creditor is considered not to have received payment of the debt, but the price for the sale to him of the action. "Cum is, qui et reum et fidejussores habens, ab uno ex fidejussoribus accepta pecunia præstat actiones, poterit quidem dici nullus jam esse, cum suum perceperit, et perceptione omnes liberati sunt; sed non ita est: non enim in solutum accipit, sed quodam modo nomen debitoris vendidit et ideo habet actiones, quia tenetur ad id ipsum ut præstet actiones" (*h*).

He becomes entitled to proceed against the principal for the whole debt, or against his co-sureties for their parts, after deducting that which was his.

(*e*) Donell ad l. 2, de cess. act, Lauterbach. ib. Disp. 82.
(*f*) Digest. lib. 46, tit. 1, l. 39.
(*g*) Voet, lib. 46, tit. 1, n. 30.
(*h*) Dig. lib. 46, tit. 1, l. 36.

The law of Holland permitted the surety to claim the cession at any time after he had paid the debt (*i*). "Tamen morum nostrorum simplicitati nunc magis convenire, ut fidejussori etiam sine ulla actionum cessione adversus reliquos confidejussores experiundi potestas asseratur, aut saltem licentia petendi etiam dudum post solutionem, sibi contra fidejussores actionem à creditore cedi, licet de ea cedenda nihil actum sit" (*j*).

The surety who pays the whole debt can enforce the actions ceded to him, and recover from his co-sureties what remains due, after first deducting that part of the debt which he, as one of the sureties, was bound to pay. If he sued any one of his co-sureties for the remainder of the debt, it would be competent for the surety so sued to insist on the benefit of division, so that each of the co-sureties would be liable only for their respective proportions of the remainder of the debt paid by the surety (*k*).

If one of the co-sureties should be insolvent, the loss is to be equally borne, as well by him who has paid the whole debt as by the other co-sureties (*l*).

The law of Holland, before the introduction of the Code Civil, and, therefore, that of British Guiana, the Cape, and Ceylon gave this privilege to the surety (*m*).

It is admitted by the law of Spain (*mm*) and in Trinidad.

It prevails in the different States of Europe.

(*i*) Voet, lib. 46, tit. 1, n. 30.

(*j*) Groeneweg. ad lib. 46, tit. 1, l. 12. Cod. lib. 8, tit. 41. Berlich. concl. pract. part 2, concl. 22, n. 75, *et seq.* Neostad. Cur. Holl. decis. 12. Sande de Cess. Act. c. 6, n. 41. Carpz. Forens. Par. 2, const. 17, def. 17.

(*k*) Hering. c. 27, p. 3, n. 4, 28, 29, 30.

(*l*) Dig. lib. 46, tit. 1, l. 26. Hering. de Fidejuss. c. 27, p. 3, 4, 36. Berlich. p. 2, conclus. Voet, lib. 46, tit. 1, n. 29. Christin. ad Leg. Mech. tit. 7, ad. 15, n. 7.

(*m*) Voet, *ubi sup.* Grot. Introd. b. 3, s. 31. (*mm*) Part 5, tit. 12, l. 2.

Before the Code Civil, the law of France gave to the surety this privilege (*n*).

The Code Civil adopts it in the following terms: "La subrogation a lieu de plein droit:—1. "Au profit de celui qui, étant lui-même créancier, paie un autre créancier qui lui est préférable à raison de ses priviléges ou hypothéques (*o*).

2. "Au profit de l'acquéreur d'un immeuble, qui emploie le prix de son acquisition au paiement des créanciers auxquels cet héritage était hypothéqué (*p*).

3. "Au profit de celui qui, étant tenu avec d'autres ou pour d'autres au paiement de la dette, avait intérêt de l'acquitter (*q*).

"Le Codébiteur d'une dette solidaire, qui l'a payée en entier ne peut répéter contre les autres que les part et portion de chacun d'eux" (*r*).

These principles are adopted in the Mauritius, and in the State of Louisiana (*rr*).

In Scotland, the creditor is bound to assign his remedy against the principal and his cautioners (*s*).

The Courts of Equity in England administer a relief to the surety, similar in its effects to that which is derived from this privilege.

A surety, upon payment to the creditor of the debt of the principal, is entitled to the benefit of all securities of which the creditor is possessed, and can render available against the principal debtor (*t*).

(*n*) Pothier, Tr. des Oblig. p. 3, c. 1.
(*o*) Code Civil, Art. 1251, 1214.
(*p*) C. 2181, s.
(*q*) C. 1214, s. 2029, s.
(*r*) Code Civil, liv. 3, tit. 3, 1214. (*rr*) Louisiana Code, Art. 3030.
(*s*) Bell's Com. 340.
(*t*) Parsons *v.* Briddock, 2 Vern. 608. S. C. 1 Eq. Ca. Ab. 93. Mayhew *v.* Crickett, 2 Swanst. 185. S. C. 1 Wils. C. C. 418. Praed *v.* Gardiner, 2 Cox. 86. Earl of Rosse *v.* Sterling, 4 Dow, 442. Beckett *v.* Mickle-

The surety is entitled to this benefit, and to the transfer of the securities, whether he was aware of their existence or not (*u*), or whether the securities had been deposited by the principal with the creditor at the same, or at different times (*v*).

But the surety will not be entitled to avail himself of the securities in the possession of the creditor, unless they have been deposited (*w*), assigned (*x*), or made chargeable (*y*), in respect of the same transaction in which the surety became liable.

A husband entitled, in right of his wife, to a sum of Bank annuities standing in the names of trustees, assigned the dividends to secure an annuity. The Bank annuities had not been reduced into possession, the Court of Chancery decided that the surety who had been called upon, and had made some payments in respect of the annuity, was, as to payments of the annuity, actually made by him, entitled to stand in the place of the creditor, and to be reimbursed out of the dividends, and that he had also an equity to have the fund applied in his exoneration (*z*).

A principal in a bond, being arrested, gave bail; judgment was recovered against the bail, and the surety was afterwards

thwaite, 6 Madd. 199. Capel *v.* Butler, 2 Sim. & S. 457. Lord Harberton *v.* Bennett, 1 Beat. 386, and see Ex parte Rogers, 4 Deac. & Ch. 623. S. C. 2 Mont. & Ay. 153, and the observations of Lord Brougham, C., in Hodgson *v.* Shaw, 3 Myl. & K. 183, and of Sir W. Grant, M. R., in Wright *v.* Morley, 11 Ves. 12, of Lord Eldon, C., in Copis *v.* Middleton, T. & Russ. 224, and of Lord Hardwicke, C., in Ex parte Crisp, 1 Atk. 133.

(*u*) Mayhew *v.* Crickett, 2 Swanst. 185. S. C. 1 Wils. C. C. 418. Praed *v.* Gardiner, 2 Cox, 86.

(*v*) Parsons *v.* Briddock, 2 Vern. 608. S. C. 1 Eq. Ca. Ab. 93.

(*w*) Wade *v.* Coope, 2 Sim. 155, and see Lord Eldon's observations in Ex parte Kendall, 17 Ves. 514. S. C. 1 Rose, 71.

(*x*) Wright *v.* Morley, 11 Ves. 12.

(*y*) Praed *v.* Gardiner, 2 Cox, 86.

(*z*) Wright *v.* Morley, *supra*.

called upon to pay and paid the debt; it was held that he was entitled to an assignment of the judgment against the bail; for though the bail themselves were but sureties as between them and the principal debtor, yet, coming in the room of the principal debtor, as to the creditor, it was held that they likewise came in the room of the principal debtor as to the surety (*a*).

The right of the surety to require from the creditor a transfer of all the securities in his possession belonging to the principal, for the purpose of obtaining his reimbursement, is confined to such securities as continue to exist. If the creditor has no other security but the bond of the principal and surety (*b*), and the latter pays the money due upon the bond, the bond thereby becomes extinguished, and all remedy upon it is at an end (*c*). The surety will derive from an assignment of it no benefit (*d*), for even the principal might plead payment to an action brought against him in the name of the obligee(*e*). The surety cannot, therefore, insist upon its assignment. A joint and several note was given by the principal and surety; the creditor recovered judgment against the principal and surety in two separate actions which he had brought against each; execution was sued upon the judgment obtained against the surety, and the latter paid the debt and costs. The surety filed his bill for the purpose of obtaining an assignment of the judgment recovered against the principal debtor, and it was held, that the creditor having been paid his debt, the judgment was satisfied; and as the creditor could not have enforced it at law against the principal, and as he could not avail himself of it at law, neither was it available in equity in

(*a*) Parsons *v.* Briddock, 2 Vern. 608. S. C. 1 Eq. Ab. 93. See Lord Brougham's judgment in Hodgson *v.* Shaw, 3 Myl. & K. 189.

(*b*) Per Lord Eldon, C., in Copes *v.* Middleton, T. & Russ. 224.

(*c*) Gammon *v.* Stone, 1 Ves. 339. Woffington *v.* Sparks, 2 Ves. 569. Copis *v.* Middleton, T. & Russ. 224.

(*d*) Jones *v.* Davids, 4 Russ. 227.

(*e*) Woffington *v.* Sparks, *supra*.

the hands of the surety, and, consequently, that the surety could not compel an assignment of it (*f*). If, however, the principal debtor had, as a collateral security for his debt, granted a mortgage to the creditor, in addition to a bond given to the creditor by the principal, in which the surety joins, and the latter had paid the creditor the money due on the bond, the surety, although he cannot call upon the creditor for an assignment of the bond, is entitled to stand in the place of the creditor as mortgagee, and to have the benefit of the mortgaged estate, which has not "got back" to the debtor, and which the surety may compel the creditor to assign to him (*g*).

When the principal is a defaulter to the Crown, and his surety pays to the Crown the debt due from the principal, the surety is entitled to stand in the place of the Crown, and to have the same remedy that the Crown itself would have had (*h*).

If a decree be obtained by the creditor in a suit instituted by him against the principal and his surety, and the surety pays what the Master reports *to be due* to the former in respect of his demands, and for his costs of the suit, the Court will, upon further directions, decree the principal to indemnify and reimburse the surety, in respect of his payments, and give the surety liberty to prosecute the decree against the principal in the name of the creditor for that purpose, upon the surety indemnifying the creditor against any costs or damage on that account (*i*). If the creditor is a mortgagee of property of the principal, and seeks to foreclose the equity of redemption

(*f*) Dowbiggen *v.* Bourne, 1 You. 111. S. C. 2 You. & Coll. 462.

(*g*) Ibid.

(*h*) Doughty's case, Wightw. 2, n. (*b*). Babb's case, Wightw. 2, n. (*c*). Rex *v.* Bennett, Wightw. 1. Anon. Sav. 30, pl. 72, and see Lord Eldon's judgment in Whitehouse *v.* Partridge, 3 Swanst. 365.

(*i*) See Lord Hardwicke's observations in Walker *v.* Preswick, 2 Ves. 622.

by his bill, and the surety pays him what is due for principal, interest, and costs, the Court will order the creditor to convey the mortgaged premises to the surety (*j*).

If the creditor is the purchaser of an annuity, and the grantor has reserved to him a power of repurchasing it upon certain terms (*k*), the surety has the same right, and may become the purchaser of the annuity upon the like terms; or, if from inadequacy of consideration (*l*), or from any other cause, the principal may claim relief in a Court of law or equity, in respect of the annuity, the same relief will be given to the surety.

(*j*) Beckett *v.* Micklethwaite, 6 Madd. 199.
(*k*) Capel *v.* Butler, 2 Sim. & S. 457.
(*l*) See Underhill *v.* Horwood, 10 Ves. 209.

BOOK IV.

CHAPTER I.

RIGHTS OF THE SURETY AGAINST THE PRINCIPAL.

I. By payment.—Not necessary it should have been preceded by or made under a judgment.—Immediate recourse to the debtor if he has made default.—By the arrival of the time of payment.—Novation, compensation, &c., considered as payments.—Surety can recover only what he has paid.—Remission by the creditor.—Its effects.—May recover damages and expenses.—Law of England.—Scotland.—France.

II. The surety may be precluded from recovering from the principal by knowingly omitting what would have been an answer to the action, or not giving notice to the debtor so as to enable him to become a party to the action.

III. His right to recover is also defeated if the payment is invalid.—Invalidity in respect of the subject, or by payment to a person not competent to receive.

Under the Civil law, and the systems of jurisprudence founded on it, and under the law of England and Scotland, the surety upon the default of the principal and by payment of the creditor, acquired an immediate right of action against the principal. The surety was entitled as has been already seen, to a cession of, and a subrogation to, all those actions, rights, and securities which the creditor could have enforced against the debtor. If he had not obtained this cession or subrogation, he was entitled in his own right to bring his action against the principal for recovering that which as surety he had paid. Under the Civil law and the systems founded on it, his remedy was by the *actio mandati contraria*, if the engagement was made with the knowledge and approbation of the principal debtor, for the consent included a tacit contract of mandate, semper qui non

prohibet pro se intervenire mandare creditur (*a*). If the surety is obliged for the principal debtor without his knowledge, he cannot have an action mandati against him, but an action having the same effect, namely, contraria negotiorum gestorum (*b*).

The principal must have made default, that is, the debt must be due and payable, because if the time of payment has not arrived when the surety pays, he cannot deprive the principal of the term allowed him. The surety cannot therefore have recourse to the principal until that time has arrived (*c*). "Si mandavero tibi, ut pro me *in diem fidejubeas*, tu que pure fidejusseris, et solveris utilius respondebitur, interim non esse tibi mandati actionem; sed cum dies venerit. Item tractatum est, si, cum in diem deberem, mandatu meo in diem fidejusseris, et ante diem solveris, an statim habeas mandati actionem. Et quidam putant, præsentem quidem esse mandati actionem, sed tanti minorem, quanti mea, intersit, superveniente die solutum fuisse; sed melius est dici, interim nec hujus summæ mandati agi posse; quando nonnullum adhuc commodum meum sit, ut nec hoc ante diem solvam (*d*)".

It is immaterial whether the surety has paid in consequence of a sentence of condemnation, or voluntarily and without a sentence: In both cases, utiliter debitoris negocium gessit, for he has obtained for the debtor his liberation from his debt, and consequently the latter ought to reimburse him what he has expended in doing so (*dd*).

It is also immaterial whether the surety has made actual payment or, that which is equivalent to it, as by compensation,

(*a*) Dig. lib. 50, tit. 17, l. 60.

(*b*) Voet, lib. 46, tit. 1, n. 31. Carpz. Def. For. Part 2, Const. 17, def. 25.

(*c*) Ibid. 17, tit. 1, l. 22. Voet, lib. 46, tit. 1, n. 33.

(*d*) Digest, lib. 17, tit. 1, p. 312.

(*dd*) Voet, ib.

novation or compromise; by either of these means he has a right to demand that the principal shall reimburse him, either the sum which he has actually paid, or what he has allowed in compensation, or what he has obliged himself to pay, in order to extinguish the obligation of the principal debtor.

But if the creditor from personal regard to the surety, has made a gratuitous remission of the debt, the surety cannot demand anything from the principal debtor who has profited by this remission, because it has cost the surety nothing. But if the remission was made as a recompense of services which the surety has rendered the creditor, the surety may require to be reimbursed the amount of the debt by the principal debtor: for in this case it has cost the surety the recompense which he might have expected for his services. Si vero non remunerandi causa, sed principaliter donando fidejussori remisit actionem, mandati cum non acturum (*e*). This is conformable to the maxim of the law, Sciendum est non plus fidejussorem consequi debere mandati judicio quam quod solverit (*f*).

Such also is the right of the surety under the law of England. As soon as the principal has made default in the fulfilment of the obligation, for the fulfilment of which the surety undertook, the latter may discharge the obligation, and relieve himself of his liability (*g*). If the obligation for which the surety engaged, was the payment by the principal of a sum of money, and the money is due to the creditor under the obligation or contract, the surety may pay the creditor the money due to him, even though he did not pay the debt by the desire of the creditor (*h*), the authority or consent of the principal to the

(*e*) Voet, ib. Dig. lib. 17, tit. 1, l. 12.

(*f*) Ibid. 17, tit. 1, l. 26, § 4. Pothier, Tr. des Oblig. p. 2, c. 6, s. 7, n. 431. Voet, lib. 46, tit. 1.

(*g*) See the judgment of Lord Kenyon, C. J., in Exall *v.* Partridge, 1 T. R. 308.

(*h*) See the judgment of Lord Kenyon, C. J., in Exall *v.* Partridge; Broughton's case, 5 Rep. 24.

payment is proved by the joint obligation of himself and surety to the creditor (*i*).

The surety having paid to the creditor the debt of the principal, may recover it from the principal in an action of indebitatus assumpsit at law (*j*); or if he has no counter security from the principal by a suit in equity (*k*). Payment by the surety's attorney or agent although not repaid to him by the surety at the time the action is brought is sufficient (*kk*).

The surety is permitted to recover by an action of *assumpsit* against the principal, the money so paid by him, upon the ground that as there is no express stipulation between the parties there is a promise implied by law on the part of the principal to reimburse him the money so paid by him for the principal (*l*): but if the surety take from his principal any security upon which he may proceed for the recovery of the money paid by him, he must resort to the remedy adapted to the security which he has taken and cannot maintain an action of assumpsit (*m*).

If at the time of action brought by the surety against the principal, the money had not been actually repaid by the surety: yet if it were shewn that the creditor had been satisfied, and could make no further claim, the right of the surety to

(*i*) Per Lord Brougham, C., in Hodgson *v.* Shaw, 3 Myl. & K. 183.

(*j*) Morrice *v.* Redwin, 2 Barnard. 26. Huntly *v.* Sanderson, 1 Cr. & Mees. 467, and see Hodgson *v.* Shaw, 3 Myl. & K. 183. Cartwright *v.* Cooke, 3 B. & Ad. 701. Layer *v.* Nelson, 1 Vern. 456, and judgments of Lord Kenyon, C. J., in Exall *v.* Partridge, 8 T. R. 308, and of Lord Eldon, C., in Ware *v.* Horwood, 14 Ves. 28.

(*k*) Ford *v.* Stobridge, Nels. 24, and Hungerford *v.* Hungerford, Gilb. Rep. 67.

(*kk*) Adams *v.* Dansey, 6 Bing. 506.

(*l*) See the judgments of Ashhurst and Buller, Js., in Toussaint *v.* Martinnant, 2 T. R. 100, c. 71.

(*m*) See the observations of Ashhurst and Buller, Js. in Toussaint *v.* Martinnant, *supra*, and see Crofts *v.* Tritton, 8 Taunt. 365. S. C. B. Moo. 411.

resort to the principal is complete, for the manner in which the surety afterwards settled the account with the person who paid the money at the surety's request does not concern the principal (*n*).

The surety, upon the default of the debtor, may enter into a compromise with the creditor, if the payment which the surety makes thereunder does not exceed the amount which the principal is bound to pay (*o*), notwithstanding the surety gives no notice to him of his intention to compound (*p*); for the only effect of a want of notice to the principal, is to let in proof on his part that the compromise was improperly made, and that the principal might have obtained better terms if the opportunity had been given him (*q*).

But the surety, if he compromises for less than the debt, can recover from the principal no more than he actually pays. It is his duty to settle the debt, and procure the discharge of the debtor upon the best terms he can obtain (*r*).

The surety is entitled to recover interest, and also damages and costs from the principal, if the latter have been sustained by him in consequence of the default of the principal. Neque tamen æquum sit, officium fidejussoris ipsi damnosum esse, regressus ei contra debitorem principalem datur in id omne quod fidejussorio nomine solvere coactus fuit, accomodata eum in finem actione mandati si ex mandato debitoris principalis fidejusserit, vel actione negotiorum gestorum, si sine mandato interveniens utiliter negotium debitoris gessisse

(*n*) See Adams *v.* Dansey, 6 Bing. 506. S. C. 4 Moo. & P. 245.

(*o*) Butcher *v.* Churchhill, 14 Ves. 567, and see Smith *v.* Compton, 3 B. & Ad. 407.

(*p*) See Smith *v.* Compton, *supra*.

(*q*) Ibid. Duffield *v.* Scott, 3 T. R. 374.

(*r*) Butcher *v.* Churchhill, 14 Ves. 567. Reed *v.* Norris, 2 Myl. & Cr. 361.

probatur (*s*). In quam utramque actionem, quæ bonæ fidei est, non modo ea veniunt, quæ principalis creditori debuit, et a fiejussore soluta sunt, sed et id quod interest adeoque et damna reliqua, quæ fidejussor passus est, eo quod debitor eum, soluto creditori mature debito non liberavit: idque secundum propriam et ordinariam actionis utriusque naturam alibi tractatam.

But if this additional payment was made in consequence of the surety's own default he cannot recover it. Nisi damnum sua culpa senserit quo pertinet, si a creditore conventus ad solvendum fidejussorio nomine, ac satis intelligens, se neque ordinis neque divisionis gandere beneficio, litigare maluerit, quam bonam fidem agnoscere ac solvere atque ita succumbens in litis expensas damnatus forte sit, aut suas saltem impensas ferre jussus: cum hactenus temerarius litigator fuerit et ita damnum hoc non qua fidejussor ex utilitate debitoris quid solvens, sed qua temerarius litigator sustineat (*t*).

The Code Civil follows these principles. La caution qui a payé a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu du débiteur (*u*). Ce recours a lieu tant pour le principal que pour les intérêts et les frais: néanmoins la caution n'a de recours que pour les frais par elle faits depuis qu'elle a dénoncée au débiteur principal les poursuites dirigées contre elle (*v*). Elle a aussi recours pour les dommages et intérêts, s'il y a lieu (*w*).

A person who was bail for another is entitled to recover from his principal all expenses fairly resulting from his relation as bail. He may, therefore, recover his expenses in sending after

(*s*) Voet, lib. 46, tit. 1, n. 31.

(*t*) Voet, lib. 46, tit. 1, n. 31. Carpz. Def. For. Part 2, Const. 17, def. 25.

(*u*) Code Civil, Art. 2028.

(*v*) Ib. 20.

(*w*) Ib.

the principal who had absconded, in order that he might take the principal and surrender him in discharge of himself (*x*). He, cannot, however, recover for his trouble and loss of time in going to a place to become bail for another, for he undertakes the journey, not as work or labour, or as a person employed by the defendant, but merely as a friend from motives of kindness (*y*).

The surety will not be allowed his costs if he put the party to a useless expense, by defending an action which he ought not to have defended (*z*), notwithstanding he may have received an indemnity (*zz*). It is said, that if a party be surety to the Crown, and an extent is taken out against his effects, and some expenses have been incurred in consequence of the surety's disputing the debt, (though a just one,) he, nevertheless, shall be allowed these expenses; as an extent is both an action and an execution in the first instance, and the surety cannot be supposed to be prepared to pay the debt immediately (*a*).

By the law of Scotland a cautioner, who has paid the debt, has an action *ex mandato* against the principal for relief; and for this purpose he is entitled to demand an assignation from the creditor, not only of the debt and whole diligence, but also of any other securities held by the creditor; and should this claim of relief be cut off by any proceeding on the part of the creditor, the cautioner is thereby liberated from his obligation. The cautioner's claim is for relief from the principal obligation, with the interest and expenses paid by him; but, under this

(*x*) Fisher *v.* Fallows, 5 Esp. 171.

(*y*) Reason *v.* Wardnam, 1 Car. & P. 434.

(*z*) Bleaden *v.* Charles, 7 Bing. 246. Roach *v.* Thompson, Mood. & M. 487, and see Fisher *v.* Fallows, 5 Esp. 171.

(*zz*) Gillett *v.* Rippon, Mood. & M. 406.

(*a*) Per Lord Hardwicke, C., in Ex parte Marshall, 1 Atk. 262.

claim, he is not entitled to include the expense of diligence against himself, because he ought to have paid without diligence (*b*).

A suit having been instituted by the creditor against the principal and his surety, and the surety having paid the amount reported by the Master to be due to him for his demands and for his costs of the suit, it has been seen, that the surety is permitted to prosecute the decree against the principal in the name of the creditor (*c*).

So, if a creditor has a mortgage on property belonging to the principal, and the creditor is seeking by his suit in equity to foreclose the equity of redemption, if the surety be a party to the suit, he will be entitled, upon payment of what is due to the creditor for principal, interest, and costs, to obtain a decree for a conveyance of the mortgaged premises by the creditor (*d*).

So if a surety institute a suit against his co-sureties for contribution, the principal will be decreed to indemnify the plaintiff and his co-sureties (*e*).

If the surety is bound for several principals, he is entitled to proceed against each of them, for the recovery of the whole of what he has paid: each of these principal debtors is debtor of the whole of the debt in favour of the creditor, and the person being surety for each of them, has, by paying, liberated each of them from the whole, and consequently, has a right to conclude *in solido* against each of them, for the reimbursement of the whole of what he has paid, with interest from the day of his demand (*f*).

(*b*) 1 Bell's Comm. 347.

(*c*) Lord Hardwicke's observations in Walker *v.* Preswick, 2 Ves. 622.

(*d*) Beckett *v.* Micklethwaite, 6 Mad. 199.

(*e*) Garside *v.* Benson, 3 Atk. 253, in notes. Lawson *v.* Wright, 1 Cox, 275.

(*f*) Poth. Tr. des Oblig. p. 2, c. 6, s. 7, Art. 1, § 5.

If the payment made by the surety included interest and arrears, such interest and arrears become a principal sum, as between the surety, who paid them, and the principal debtor for whom he has paid: and the surety is entitled to interest upon the whole from the time of his demand (*g*).

If the surety has obtained a subrogation to the rights of the creditor, he will rank against the debtor in the same degree as the creditor would have done, if he had not been paid; but as he is only entitled to the interest upon that sum in his own right, he will only be entitled to rank for such interest from the day of the condemnation which he has obtained against him (*h*).

If the surety demands from one of the principal debtors the whole of the debt which he has discharged, he ought to cede to this debtor, not only his actions in his own right against the other debtors, but also the actions of the creditor to whom he may have procured a subrogation; but if the surety, in paying the creditor, has neglected to acquire this subrogation, and has thereby incapacitated himself from assigning it to the principal debtor from whom he demands the whole of the debt, this debtor may, on offering to reimburse him for his own part, obtain, *per oppositam actionem cedendarum actionum*, a liberation from the demand of the surety for the parts of the other principal debtors (*h*).

But if the principal has no interest in having the subrogation of the creditor's actions, because he can derive the same advantage from the subrogation to the actions which the surety has in his own right, as from the subrogation to the actions of the creditor, he has no reason to complain that the surety did not, when paid, require the subrogation of the actions of the creditor, and

(*g*) Poth. ib.
(*h*) Ibid.

cannot procure it for him, and, consequently, he cannot avail himself of the exception, *cedendarum actionum.*

Thus, several debtors had borrowed, *in solido*, a sum of money under the engagement of A. as surety, and each of them had given A. an act of indemnity before a notary, of the same date as the obligation which they had contracted in favour of the creditor. A. paid the debt without requiring a subrogation to the actions of the creditor, and demanded repayment of the whole from one of the debtors; in this case he cannot complain of A. not being able to procure for him the subrogation of the actions of the creditor: for the action which A. has against the co-debtors, and to which A. is ready to subrogate him, having the benefit of an hypothecation, of the same date as the hypothecation of the creditor, the subrogation which A. offers him, procures him the same advantage against the co-debtors as the subrogation of the rights of the creditor could have done, and, consequently, he has no ground to complain that A. had not procured it for him (*i*).

The surety who has only become such for one of the debtors *in solido*, and not for the others, when he has discharged the debt, has only a direct action against the one for whom he has become surety, and can only have the rights and actions against the others, which would have belonged to his principal in case of payment by him (*i*).

The Code Civil expressly gives to the surety, who has become such for all the principal debtors, the right of resorting to each for the recovery of the whole he has paid (*k*).

The surety may, notwithstanding the payment which has been made by him, be precluded from having recourse against the principal, either because he had, by his own fault, neg-

(*i*) Pothier, ib. (*k*) Art. 2030.

lected to oppose an exception or defence to the creditor's action, which would have prevented him from recovering; or because the payment made by the surety was invalid, and did not liberate the principal debtor; or because the principal debtor had paid a second time, through the fault of the surety.

The surety who has paid will be deprived of recourse against the principal debtor, if he has knowingly omitted to oppose to the creditor's action any exception competent to him against the creditor's right to enforce the debt, or has not given notice to the debtor, and required him to become a party to and defend the action.

"Si fidejussor ex sua persona omiserit exceptionem, qua reus uti non potuit, si quidem minus honestam, habere eum mandati actionem; quod si eam, qua reus uti potuit, si sciens id fecit, non habiturum mandati actionem: si modo habuit facultatem rei conveniendi, desiderandique, ut ipse susciperet potius judicium vel suo vel procuratorio nomine"(*j*).

Thus, if a person had become surety for the price of an estate which another had purchased, and knowing that the purchaser had been evicted from the estate, notwithstanding pays the price to the vendor, the surety will have no recourse against the purchaser, because he could have avoided paying, by opposing to the vendor the exception arising from the eviction which the purchaser had suffered; but if the surety were ignorant of the eviction, and, consequently, of the exception resulting from it, the purchaser must restore him what he has paid, and the purchaser's remedy will be against the seller.

"Si fidejussor conventus, cum ignoraret non fuisse debitori numeratam pecuniam, solverit ex causa fidejussionis, an mandati judicio persequi possit id, quod solverit, quæritur. Et si

(*j*) Dig. lib. 17, tit. 1, l. 29. Voet, lib. 46, tit. 1, n. 33.

quidem sciens prætermiserit exceptionem, vel doli vel non numeratæ pecuniæ, videtur dolo versari; dissoluta enim negligentia prope dolum est. Ubi vero ignoravit, nihil quod ei imputetur. Pari ratione et si aliqua exceptio debitori competebat, pacti forte conventi, vel cujus alterius rei, et ignarus hanc exceptionem non exercebet, dici oportet, ei mandati actionem competere, potuit enim atque debuit reus promittendi certiorare fidejussorem suum, ne forte ignarus solvat indebitum" (*k*).

But it is only an ignorance of fact which can, in this case, excuse the surety; it would be otherwise with respect to an ignorance of the law: for instance, if A. had purchased a house which he supposed to subsist, but which had been entirely consumed by fire previous to the contract, and B. becomes surety for the price, although he should, after knowing of the accident, pay the price which, from an error, he believed to be due, he ought not to have any recourse against A. "Non male tractabitur, si, cum ignoraret fidejussor inutiliter se obligatum, solverit, an mandati actionem habeat? Et siquidem factum ignoravit, recipi ignorantia ejus potest; si vero, jus, aliud dici debet" (*l*).

If the surety had a competent exception to oppose to the creditor, but it was such that he could not in honour oppose it: in this case the surety is not indeed obliged to oppose it, but he ought not to deprive the debtor of the power of opposing it, therefore he ought to allow himself to be assigned for the payment, and have the principal debtor made a party to the cause, in order that he might oppose it, if he thought proper; in default of doing so, the surety will have no recourse against the principal debtor for what he has paid.

(*k*) Voet, lib. 46, tit. 1, n. 33. Neostad. Cur. Sup. Decis. 34. Hering. de Fidejuss. c. 26, n. 10, *et seq.* Poth. Tr. des Cont. Part 2, c. 6, § 3.

(*l*) Dig. lib. 17, tit. 1, l. 29.

Si quis sub usuris creditam pecuniam fidejussisset et reus in judicio conventus cum recusare vellet sub usuris creditam esse pecuniam et fidejussor solvendo usuras potestatem recusandi eas reo sustulisset, eam pecuniam a reo non petiturum: sed si reus fidejussori denunciâsset, *ut recusaret*, sub usuris debitam esse, nec is propter suam existimationem recusare voluisset, quod ita solverit, a reo petiturum. Hoc bene censuit Scævola: parum enim fideliter facit fidejussor in superiore casu, quod potestatem eximere reo videtur, suo jure uti: cæterum in posteriore casu, non oportet esse noxiæ fidejussori, si ipse pepercisset pudori suo" (*m*).

But the surety is not bound to oppose an exception personal to himself and which could not be opposed by the principal debtor; for instance, if the surety who has engaged for the principal till a certain term, pay for him after this term; though he might have avoided paying, he will, notwithstanding, have recourse against the principal, because he has paid for the principal what the latter could not have avoided paying. "Quamquam enim jam liberatus solvit tamen fidem implevit et debitorem liberavit" (*mm*).

If the payment which the surety has made is invalid and does not discharge the debtor, he is deprived of his right to resort to the latter. Pothier states an instance in which such payment would be invalid, because that which the surety delivered to the debtor in performance of the debtor's obligation did not belong to him. "Pour que la caution ait un recours contre le débiteur principal, il faut que le paiement qu'elle a fait soit valable; c'est pourquoi, si celui, qui me doit un cheval indéterminément, m'a donné une caution, et que cette caution, par la suite, m'en fournisse un qui se trouve ne lui pas appartenir, la caution n'aura point de recours contre le débiteur principal,

(*m*) Dig. ib. l. 48. (*mm*) Ib. l. 29.

parceque le paiement qu'elle a fait n'est pas valable, et n'a point procuré au principal débiteur sa libération" (*n*).

The payment may be invalid because it has been made to a person who was not the lawful agent of the creditor, "Mandatu tuo fidejussi (in) decem, et procuratori creditoris solvi; si verus procurator fait, statim mandati agim: quod si procurator non est, repetam ab eo" (*o*).

The surety will also be deprived of his resort to the debtor if the latter in consequence of the default of the surety in not apprising him of the payment, has paid the creditor a second time (*p*); but at least he may demand that the principal should cede to him his action, to recover from the creditor what he received when it was no longer due to him (*q*).

But if the surety being sued by the creditor should pay, through ignorance, what the principal debtor had already paid, he is entitled to recover it from the principal, for although the payment made by the surety, being the payment of a sum which had ceased to be due, be not a valid payment, nevertheless the surety will still have recourse to his "actio mandati contraria," against the principal debtor, to be reimbursed the sum which he has paid upon subrogating the principal debtor to his action of repetition against the creditor: for the principal debtor is in default, in not having informed the surety that he had paid (*r*).

The Code Civil has adopted these principles: "La caution qui a payé une première fois n'a point de recours contre

(*n*) Pothier, tom. 1, Trait. des Oblig. ch. 6, p. 256. Dig. lib. 17, tit. 1, l. 26, § 5. Dig. lib. 12, tit. 4, l. 14. Voet, lib. 46, tit. 1, n. 33. Hering. de Fidejuss. c. 26, n. 14 and 119. Ib. c. 25, s. 27, n. 3, and 119.

(*o*) Lib. 17, tit. 1, l. 16. Hering. de fidejuss. ib. n. 76.

(*p*) Voet, lib. 46, tit. 1, n. 33.

(*q*) Pothier des Oblig. Art. 1, § 3.

(*r*) Pothier ib.

le débiteur principal qui a payé une seconde fois, lorsqu'elle ne l'a point averti du paiement par elle fait; sauf son action en répétition contre le créancier.

"Lorsque la caution aura payé sans être poursuivie et sans avoir averti le débiteur principal, elle n'aura point de recours contre lui dans le cas, où, au moment du paiement, ce débiteur aurait eu des moyens pour faire déclarer la dette étiente; sauf son action en répétition contre le créancier" (*s*).

(*s*) Code Civil, Art. 2031.

CHAPTER II.

RIGHT OF THE SURETY TO PROCEED AGAINST THE PRINCIPAL BEFORE PAYMENT.

Under the Civil Law four cases in which before payment the surety might proceed against the principal.—The former and present law of France.—Law of Scotland.—Not necessary the surety should have been condemned to pay.—Relief by the law of England.

UNDER the Civil law there were four cases in which the surety might before he paid the debt proceed against the principal. 1st, when the surety had been condemned to pay. 2ndly, when the principal debtor was in failing circumstances. 3dly, when the principal had undertaken to procure the surety his discharge within a certain time. 4thly, if the principal had for a long time left the obligation undischarged (*a*).

"Si pro ea contra quam supplicas, fidejussor seu mandator intercessisti, et neque condemnatus es, neque (bona) (sua) eam dilapidare, (postea) cæpisse comprobare possis, ut (tibi) justam metuendi causam præbeat; neque ab initio ita te obligationem suscepisse, ut eam possis et ante solutionem convenire; nulla juris ratione, antequam satis creditori pro ea feceris, eam ad solutionem urgeri certum est (*b*).

The first case is where the surety is condemned to pay si condemnatus es.

(*a*) Voet, lib. 46, tit. 1, n. 34. Hering. de Fidej. c. 25, n. 12, *et seq.*
(*b*) Cod. lib. 4, tit. 35, l. 10. Voet, lib. 46, tit. 1, n. 34. Hering. ib.

The second case is when the principal debtor is in failing circumstances, *neque postea bona sua dilapidare comprobere possis*; in this case, the surety, although he had never yet paid, might attach the goods of the principal debtor, to answer the engagement which he had entered into for him.

The third case is, when the debtor has obliged himself to procure the surety his discharge from his engagement within a certain time; in this case, after the time is elapsed, the surety may proceed against the principal debtor requiring him to produce such discharge, or to advance money sufficient to pay the creditor.

The law says, *neque ab initio;* because, according to the principles of the Civil law, this agreement ought to have intervened at the time of the mandate, agreements which were not entered into till after the contract being merely simple pacts, which, according to the subtilty of the Civil law, could not produce an action. But as these subtilties form no part of the jurisprudence of those countries which adopt the Civil law, it is immaterial whether the agreement intervened at the time of the contract or afterwards.

A fourth case is that of the principal debtor having allowed the obligation to continue for a considerable time undischarged. To the question, "Fidejussor an at prius, quam solvat, agere possit, ut liberetur?" it is answered, "Nec tamen semper expectandum est, ut solvat, aut judicio accepto condemnetur, si diu in solutione reus cessabit, aut certe bona sua dissipabit; præsertim si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat"(*c*).

Although there is no undertaking by the principal debtor to discharge the surety from his engagement within a certain time, yet the surety, whose obligation continues a considerable time, may assign the principal debtor to procure his discharge

(*c*) Dig. lib. 17, tit. 1, l. 38.

from it. The law by the term "*diu*," imports a considerable time, but it does not determine it precisely. Bartholus fixes it at two or three years; several suppose it to extend ten years from the date of the engagement: nothing can be decided in this respect, it must depend upon circumstances, and be left to the discretion of the judge (*d*).

Lucius Titius Publio Mævio filio naturali domum communem permisit, non donationis causa, creditori filii obligare; postea Mævio defuncto, relicta pupilla, tutores ejus judicem adversus Titium acceperunt, et Titius de mutuis petitionibus: Quero, an domûs pars, quam Titius obligandam filio suo accomodavit arbitratu judicis liberari debeat? Marcellus respondit, an et quando debeat liberari, ex persona debitoris, itemque ex eo, quod inter contrahentes actum esset; ac tempore, quo res, de qua quæreretur, obligata fuisset, judicem æstimaturum; est enim earum specierum judicialis questio per quam res expediatur *e*).

When the obligation to which a surety has acceded, must from its nature exist a certain time, however long it may be, the surety cannot within that time demand that the principal debtor should discharge him from it: for as he knew, or ought to know the nature of the obligation to which he acceded, he should have reckoned upon continuing bound during the whole of that time: and therefore the person who has become surety of a guardian for the due execution of his trust, cannot require the guardian, so long as such trust lasts, to discharge him from his engagement, because the obligation which results from the administration of his trust, cannot end before such trust. For the same reason, a person who has become surety for a husband in favour of his wife for the restitution of her portion, cannot, whilst the marriage continues, compel the surety to discharge

(*d*) Baldus, ad l. 38.
(*e*) Baldus, ad l. 38.

him from his engagement, because, the obligation from its nature is to be continued until after the dissolution of the marriage (*f*).

By the former as well as the present law of France the surety was not obliged to wait until there had been a judgment against him. As soon as he is proceeded against by the creditor, he may assign the principal debtor requiring him to discharge it, and he ought even to do so: in default of which the debtor is not liable to acquit the surety from the expenses incurred between the first demand and the assignment.

The debtor, whom the surety has not assigned, may even sometimes defend himself from the discharge of what the surety has been condemned to pay, when he had good grounds of defence against the demand of the creditor which he might have opposed if he had been assigned (*g*).

By the Code Civil,—La caution même avant d'avoir payé peut agir contre le débiteur pour être par lui indemnisée (*h*). 1. Lorsqu'elle est poursuivie en justice pour le paiement; 2. Lorsque le débiteur a fait faillite, ou est en déconfiture; 3. Lorsque le débiteur s'est obligé de lui rapporter sa décharge dans un certain temps; 4. Lorsque la dette est devenue exigible par l'échéance du terme sous lequel elle avait été contractée; 5. Au bout de dix années, lorsque l'obligation principale n'a point de terme fixe d'échéance à moins que l'obligation principale, telle qu'une tutelle, ne soit pas de nature à pouvoir être éteinte avant un temps déterminé.

An agreement between the surety of an annuity and the principal debtor that the debtor should be obliged to discharge him from his engagement, at the end of a certain term agreed upon between the parties, seems to be valid, and the surety may, at the end of the term agreed upon, demand from the

(*f*) Pothier, Tr. des Oblig. p. 2, c. 6, § 7.
(*g*) Pothier, ib. pl. 2, c. 6, § 7, Art. 2.
(*h*) Art. 2032.

principal debtor a discharge from his engagement, and that he should be bound to redeem the annuity; for although it is the essence of such annuities, that the debtor cannot be compelled by the creditor to redeem them, yet there is nothing to prevent his being compelled by a third person; the essence of the contract is the entire alienation of the principal paid by the creditor for the purchase of the annuity.

If there has been no agreement between the principal and the surety, Dumoulin is of opinion that the surety cannot, at the end of any time, however long it be, oblige the principal debtor to redeem the annuity, in order to discharge him from his engagement: for, the nature of the annuity being that it shall always continue until the debtor chooses to redeem it, the surety, who knew the nature of the debt, and has agreed to engage for it, has submitted to contract an obligation of as long a duration as the annuity, "Non obstat quod diu vel perpetuo remanebit in obligatione, quia hoc est de natura obligationis, et sic prævisum fuit: et tamen fidejussit, et se perpetuo obligavit; simplex autem promissio indemnitatis intelligitur secundum naturum obligationis principalis"(*h*). Thus he adds, a person who becomes a surety for another, who has taken a lease of an estate for the term of twenty-four years, contracts an engagement of a like duration; so the sureties for the administration of a tutelage, so the sureties of a husband for the restitution of the portion, contract engagements which are to last as long as the lease, or the marriage, and which cannot be discharged any sooner.

Notwithstanding these reasons, it has been decided, that when there has been no agreement between the principal debtor and the surety, if the surety is bound at the request of the debtor, and his engagement has lasted for a considerable time, as for ten years at least, he is entitled to demand that the principal debtor

(*h*) Dumoulin Tr. de Usur. 2, 30.

shall liberate him from his engagement by redeeming the annuity within a certain time, to be limited by the Judge: the reason is, that if the nature of an annuity is to last for ever, unless it be redeemed, it is also the nature of it to be always redeemable; if the surety of a person taking a farm for a long term of years, or of a tutor, or of a husband, for the restitution of the portion, can only be discharged after the expiration of the lease, or after the expiration of the tutelage, or of the marriage, it is because of the nature of these obligations not to terminate sooner: therefore, a person who becomes surety for these kinds of obligations should have calculated upon the obligation of his engagements not finishing sooner; but as annuities may be reduced, and frequently are so, the person who has become surety for the debtor, may have reckoned that the debtor would redeem it, and that his engagement would not be perpetual; therefore, when it continues too long, he ought to be relieved in his demand against the debtor to discharge him by redeeming the annuity: this is the opinion of Basnage, p. 2, ch. 5. Lacombe cites an *arrêt*, by which it was so decided.

By the law of Scotland, the cautioner is entitled to sue the principal debtor for relief from the cautionary obligation, even before payment; first, when the debtor is taken bound to deliver the cautionary obligation, cancelled at the same time at which he is bound to pay the creditor, and when the term of payment is past, because, in that case, the cautioner is as fully entitled to insist for implement of the obligation as the creditor himself is. Secondly, where the principal debtor is *vergens ad inopiam*, the cautioner may attach his funds for his relief before either payment or distress. Thirdly, if the cautionary obligation be conditional, and may be long pendant, the cautioner will be allowed to adjudge in security, although there have been no previous distress under the qualification that no execution shall follow on the decree until distress.

Where an additional cautioner is interposed, and becomes bound in a separate deed, as in a bond of combination, it has been questioned whether the new cautioner has a total relief against the original cautioners, or a proportional relief only. The rule seems to be, that if the new cautioner have become bound on behalf of the former cautioners, he will be entitled to claim a total relief from them. If he has interposed solely on account of the principal debtor, he will be entitled to a proportional relief only, precisely as if he had become bound along with the original cautioners (*i*).

By the law of England, when the liability of the surety has attached in consequence of the default of the principal, the surety, although he has not been sued by the creditor, may apply to a Court of Equity, and compel the principal to relieve him from his liability (*j*), "for if a person is security on a contract, there is a joint contract that the principal shall indemnify the security, and the ground of equity is, that when the money is due the equity arises" (*k*); and it is unreasonable that a surety should be for ever at the mercy of the creditor, in respect of an engagement which ought to be performed by the principal (*l*). But the surety is not entitled to this relief unless the principal has actually failed to perform his engagement, as where the latter had engaged to pay the creditor a sum of money at a time stated, and allowed the day of payment to

(*i*) Smiton *v.* Millar, Nov. 15, 1792, Fac. Coll. Mor. p. 2138.

(*j*) See the observations of Lord Thurlow, C., in Nisbett *v.* Smith, 2 Bro. C. C. 579; of Lord Cowper, C., in Hungerford *v.* Hungerford, Gill. Eq. Rep. 67; of Sir J. Jekyll, M. R., in Lee *v.* Brook, Mos. 318; of Lord Keeper North, in Ranelaugh *v.* Hayes, 1 Eq. Ca. Ab. 79, pl. 5. S. C. 1 Vern. 190. S. C. 2 Ch. Ca. 146, and of Sir W. Grant, M. R., in Antrobus *v.* Davidson, 3 Meriv. 569, and see Evelyn *v.* Evelyn, 2 P. Wms. 659. S. C. 20 Vin. Abr. 103, pl. 7.

(*k*) Per Lord Cowper, C., in Hungerford *v.* Hungerford, *supra*.

(*l*) See the observations of Lord Keeper North, in Ranelaugh *v.* Hayes, *supra*.

elapse without payment of the money (*m*). He cannot obtain relief upon any general equity to have an indemnity, or to have the money paid into Court, if the day of payment has not elapsed, and the surety has not been damnified (*n*). If the principal, in order to indemnify the surety, in consequence of the engagement of the latter to become answerable for him in a certain amount, gives a bond to the surety, conditioned for the payment to him, at a day named, of the same or other sum of money, (though really given by way of indemnity,) the debt accrues from the day mentioned in the condition, and if the money is not then paid by the principal to the surety, the condition is broken, and the surety may sue the principal upon the bond (*o*), although the surety may not have been called upon by the creditor (*p*), or have paid him anything in respect of the original engagement (*q*), and the principal will not be allowed to plead that the bond was given by him to the surety merely as an indemnity (*r*).

If the principal has given to the surety a bond of indemnity merely, the surety must prove that he has been damnified. The bond is then forfeited, and the surety may proceed on it (*s*).

A surety bound for the payment by the principal to the

(*m*) See Lord Eldon's observations in Cock *v.* Ravie, 6 Ves. 283.

(*n*) Dale *v.* Lolley, 2 Bro. C. C. 582, in notes.

(*o*) Bayley, J., in Penny *v.* Foy, 8 B. & Cress. 11. S. C. 2 Man. & Ry. 181, and see Toussaint *v.* Martinnant, *supra*.

(*p*) Per Bayley, J., in Penny *v.* Foy, *supra*, and see Toussaint *v.* Martinnant.

(*q*) Per Bayley, J., in Penny *v.* Foy, *supra*, and see Holmes *v.* Rhodes, 1 Bos. & P. 638. Toussaint *v.* Martinnant, *supra*.

(*r*) Mease *v.* Mease, Cowp. 47. Holmes *v.* Rhodes, *supra*.

(*s*) Challoner *v.* Walker, 1 Burr. 574. Duffield *v.* Scott, 3 T. R. 374. Cutler *v.* Southern, 1 Saund. 116. S. C. 1 Lev. 194; and see the judgments of Bayley, J., in Penny *v.* Foy, 8 B. & C. 11. S. C. 2 Man. & Ry. 181, and of Gibbs, C. J., in Young *v.* Taylor, 8 Taunt. 315. S. C. 2 J. B. Moo. 326.

creditor of a sum of money, at a day named, receives a counter bond from the principal to save him harmless. If the principal does not pay the money to the creditor upon the day named in the original bond, there is a forfeiture of the counter bond, although the surety is not otherwise damnified; for by failure of payment of the money to the creditor by the principal at a day named, the non-payment puts the surety in danger of being arrested, which is a damnification, and consequently there is a present breach of the condition, and a forfeiture of the bond (*t*).

In *Broughton's* case (*u*), it was held by Bryan and Littleton, Js., upon an action brought by the surety upon a bond of indemnity, that terror of suit, so that the surety dare not go about his business, is a damnification, although he be not arrested or forced by process (*v*).

If the condition of the bond by the principal to the surety is broken, the surety's right to sue at law becomes absolute, and it seems that equity would give the principal no relief except upon payment by him of all that is due in respect of the transaction to which the surety was a party (*w*).

(*t*) See Abbots *v.* Johnston, 3 Bulstr. 233.

(*u*) 5 Rep. 24.

(*v*) S. P. Bartwright's case, Ow. 19, and see Kerr *v.* Mitchell, 2 Chitt. 487. Cutler *v.* Southern, 1 Saund. 116. Lord Ellenborough, in Sparkes *v.* Martindale, 8 East, 593.

(*w*) Anon. Carey, 26, and Cases, *supra*.

BOOK V.

RIGHTS OF SURETIES AGAINST EACH OTHER.

Right to contribution.—Doctrine of the Civil Law.—Holland.—France.—Principle on which the right of contribution is founded.—Under those systems of jurisprudence surety might, on being proceeded against, insist on co-sureties coming forward to relieve him.—Law of Scotland.—Law of England.—Remedy at common law.—In Equity.—Right to rateable contribution.—How affected by the contract of the parties.—The surety calling for contribution must have paid more than his proportion.—Amount recoverable from co-sureties.—When the surety may be deprived of his remedy by prescription.—Laches.

UNDER the Civil law a surety, by obtaining a subrogation to the actions of the creditor against his co-sureties, might, by enforcing those actions, recover from them, but he had not in his own right any action against them, even when he had paid the debt (*a*).

It was considered that when several persons became sureties for one and the same debtor they did not contract any obligation with one another; each of them had no other intention than to render a kindness to the principal debtor; each of them only propose to undertake the concerns of the principal debtor, and not that of his co-sureties, "solius rei principalis negotium gerit, non alter alterius negotium gerit."

This principle is not admitted into the jurisprudence of Holland, France, or any of the States of Europe which adopt the Civil law (*b*). The surety who has paid the whole

(*a*) Dig. lib. 46, tit. 1, l. 39. Cod. lib. 8, tit. 41, l. 11.

(*b*) Argent, Art. 213. Fab. Cod. lib. 8, tit. 28, def. 7. Neostad. Cur. Holl. Dec. 12. Voet, lib. 46, tit. 1, n. 30. Hugo Grot. Manud. ad Jurisp. Holl. lib. 3, tit. 3, n. 62. Groeneweg. ad l. 12. Sande de Cess. Act. 6, n. 41. Basnage, Tr. des Hypoth. p. 2, c. 6. Poth. Tr. des Oblig. p. 2, c. 6, Art. 4, 446. Hering. de fidej. c. 27, p. 3, n. 29,

debt may, without a subrogation of actions, recover a proportion of it from each of his co-sureties.

This right of action is not derived from the engagement which the surety has entered into with his co-sureties, because by that engagement they have not contracted any obligation between themselves, but it arises in consequence of the payment which he has made of the whole debt, and from the principle of equity, which will not allow his co-sureties, who were equally liable to the debt, to profit at his expense by the payment which he made (*c*).

It has been maintained by Basnage, on the authorities referred to by him, that if the principal debtor be insolvent, the surety has an action in his own right against his co-sureties, not only after he has paid the creditor, to recover from them their proportions, but that even before payment each of the sureties has an action against his co-sureties to contribute with him to the payment of the sum which they all owe to the creditor (*d*).

Pothier, however, dissents from this doctrine, and considers that the authors have gone too far. He admits that when one of the sureties is sued by the creditor, he has an action against his co-sureties to contribute their part of the sum demanded, and that in default of doing so they may each be bound for their part of the expenses incurred, after the suit has been notified to them. This action arises from the suit which has been instituted against the surety, and from the principle of equity which does not permit that one of several, who are equally bound for one and the same debt, should be proceeded against rather than the others. Upon this equitable ground is founded the benefit of division among sureties: upon the same ground which allows a surety, when sued for pay-

(*c*) Pothier, ib.

(*d*) Basnage, Tr. des Hypoth. p. 2, c. 6. Brodeau, sur Louet, Lettre 7, s. 27. Poth. ib.

ment, to require the creditor to divide his action between the sureties, the surety should likewise be entitled to require his co-sureties to contribute their respective parts to the payment of the debt, and in default of doing so, to pay the expenses incurred after the notification of the suit to them. He ought to be admitted to make this demand, even where he has renounced the benefit of division, or is excluded from it by the nature of the debt for which he is surety, as this renunciation and exclusion are only in favour of the creditor (*e*). But this great Jurist insists, that as long as the surety is not sued for payment, he has not any action against his co-sureties to oblige them to contribute with him to the payment of the debt: for as there is no obligation contracted between the co-sureties, the action that any one of them has against the others, when a suit is instituted against him, is only founded upon equity, arising from the suit itself, whence it follows that until he is proceeded against he has no such right of action.

The Code Civil adopts the doctrine of contribution amongst co-sureties. "Lorsque plusieurs personnes ont cautionné un même débiteur pour une même dette, la caution qui a acquitté la dette a recours contre les autres cautions. Chacune pour sa part et portion" (*f*).

By the law of Scotland a co-cautioner, who has paid, has an action of relief, without the necessity of any conveyance from the creditor (*g*).

By the law of England there is a right of contribution between co-sureties, whether by separate instruments or by the same instruments (*h*). A surety is not the less entitled

(*e*) Poth. ib.

(*f*) Art. 2033.

(*g*) 1 Bell's Comm. 347. Rio *v.* Broomhall Cautioners, M. 3533.

(*h*) Mayhew *v.* Crickets, 2 Swanst. 185. 1 Wils. C. C. 418. S. P. Craythorne *v.* Swinburne, 14 Ves. jun. 160.

to this contribution, because, at the time he became surety, he was ignorant that he had a co-surety.

This right of contribution amongst sureties is founded, not in contract, but is the result of general equity on the ground of equality of burden and benefit. Therefore, where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute (*i*).

The law of England fully adopts and gives effect to the principle on which the surety is entitled to contribution by his co-sureties. An action, therefore, is maintainable at law for the recovery from a co-surety of that part which he ought to contribute. Lord Eldon was of opinion, that it was only in modern times that the Courts of law assumed a jurisdiction upon this subject. The principle of equity, upon which a surety has a right to call upon his co-surety for contribution, being established, the implied knowledge of that principle raises the implied promise on which the jurisdiction of Courts of law on this subject is sustained (*j*). This jurisdiction is resorted to when the case is not complicated, but it is attended with great difficulties when the sureties are numerous, and separate actions must be brought against the different sureties for their respective quotas and proportions.

A multiplicity of actions is prevented by filing a bill in equity (*k*), and this proceeding will be indispensable if the surety requires a discovery of the persons who are his co-sureties, the instruments by which they become such, and the amount (*l*). It will be the only effectual means by which the

(*i*) Deering *v.* Winchelsea, 1 Cox, 318 ; 2 B. & P. 270. Pendlebury *v.* Walker, 4 You. & C. 424.

(*j*) Craythorne *v.* Swinburne, 14 Ves. 164.

(*k*) Craythorne *v.* Swinburne, 14 Ves. 160. Wright *v.* Hunter, 5 Ves. 792. Cowell *v.* Edwards, 2 Bos. & P. 268. Underhill *v.* Horwood, 10 Ves. 209.

(*l*) Craythorne *v.* Swinbourne, *supra*.

quantum of contribution to be paid by each surety can be ascertained (*m*). It is the only remedy where the sureties are each bound in distinct and several penalties (*n*), or where one of the sureties has been obliged to pay, the second has become insolvent, and the third is required to contribute rateably to the payment of the *whole debt;* because, at law, only one-third could be recovered from him (*o*).

If the creditor obtain a decree against sureties for the payment of the debt of the principal, the sureties will be allowed to prosecute the decree against each other for contribution, if either has been compelled to pay more than his proportionate part (*p*).

Where several parties are sureties for the payment of one sum of money, though, by distinct instruments, and one pays more than an equal share of that sum, he may compel contribution from his co-sureties; but if it be agreed between the parties, that each surety shall be responsible only for a given portion of one sum of money, the right of contribution amongst the co-sureties cannot be enforced (*q*).

So when the sureties are bound by different instruments, for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction, there is no right of contribution between them (*r*).

An estate is mortgaged by A. to B. C. joined in the mortgage deed as a surety; and A. and C. gave a joint bond for the payment of the sum advanced by B. A. afterwards, by indenture, to which C. was no party, sold the estate to D.,

(*m*) Birkley *v.* Presgrave, 1 East, 220.

(*n*) Collins *v.* Prosser, 1 B. & C. 682.

(*o*) Peter *v.* Rich, 1 Ch. Rep. 34. Hole *v.* Harrison, 1 Ch. Ca. 246. Cowell *v.* Edwards, 2 Bos. & P. 268. Browne *v.* Lee, 6 B. & C. 689.

(*p*) Greerside *v.* Benson, 3 Atk. 253, in notes.

(*q*) Pendlebury *v.* Walker, 4 You. & C. 424.

(*r*) Cooper *v.* Twynam, 1 Turn. & Russ. 426.

who undertook to pay B. the sum advanced by him to A., and covenanted to indemnify A. and C. from the payment thereof. D. was afterwards called on for payment by B.: C. advanced to D. the sum due to B. in discharge of the mortgage:—It was held that C. was not entitled to recover from D. in an action for money paid (*s*).

B. and C. were jointly bound as sureties for A. D., the wife of A., charged her separate estate thereby to indemnify B. from all losses, &c. The whole loss was borne by B. alone, who afterwards, without the concurrence of D., released C. his co-surety:—Held that D.'s separate estate was thereby released from the moiety of the losses (*t*).

A. and B. were sureties for C., a collector of taxes, who became a defaulter. The obligees sued A. and recovered. It was held, that in an action by A. against B. for contribution, A. could only recover half the amount of the verdict against him, but he can recover from B. either the half of the taxed costs of the obligees, or the half of his own costs of defending the action (*u*). If A., after the verdict in the action against him on the bond, obtains a sum of money from C., he must take that in reduction of the amount of the verdict, and can not apply it either to pay his own costs, or the taxed costs of the obligees.

A surety, to be entitled to resort to his co-sureties, who have been discharged by the creditor, must have paid more than his rateable proportion of the debt for which he was bound with his co-sureties. A creditor compounded with one of the four sureties, and under the bankruptcy of another of the co-sureties, he received a dividend. It was held that the other two sureties must have paid more than half of the debt which was the proportion which they were liable to con-

(*s*) Crafts *v.* Tritton, 2 Moore, 411.
(*t*) Hodgson *v.* Hodgson, 2 Keen, 604.
(*u*) Knight *v.* Hughes, 3 Car. & P. 467; 1 M. & M. 247.

tribute, before they could call on the other two sureties for contribution (*v*).

A surety is not entitled to recover from his co-sureties interest on the money paid by him (*w*), though the debt paid by him, and for which the other sureties were equally liable, was a debt by specialty (*x*). A surety in a bond paying it off in the lifetime of his principal, is only a simple contract creditor, and, therefore, not entitled to charge interest against the principal (*y*): a Court of Equity would not allow him to charge it against his creditors. One of the two sureties, for the payment of an annuity by A., had received from his co-surety a covenant, indemnifying him against all actions, suits, costs, charges, damages, demands, sums of money, and expenses, which might be incurred by reason of the non-payment of the annuity by A.; a Court of Equity will not imply a covenant to pay interest on the payments made by the surety in respect of the annuity, although a jury might, under the terms of the covenant of indemnity, have given interest in the form of damages (*z*).

B., as surety for A., became bound with him in a joint bond to C. and D. in a penalty of 180,000*l.* conditioned for the payment of 90,000*l.*, with interest at 5*l.* per cent. By a counter bond of the same date, A. became bound to B. in a like penalty conditioned to save harmless and keep indemnified the said B. his heirs, executors, and administrators from the payment of the said sum of 90,000*l.* and interest, and from all costs, charges, *damages*, and expenses which he or they might sustain for or on account of the non-payment of the said sum of 90,000*l.* and interest. After the deaths of A. and B., the executors were

(*v*) Ex parte Gifford, 6 Ves. 805.

(*w*) Onge *v.* Truelock, 2 Moll. 31. Bell *v.* Free, 1 Swanst. 90. Swain *v.* Wall, 1 Ch. Rep. 149.

(*x*) Copis *v.* Middleton, T. & Russ. 224.

(*y*) Onge *v.* Truelock, 2 Moll. 31.

(*z*) Bell *v.* Free, 1 Swanst. 90. Rigby *v.* M'Namara, 2 Cox, 415.

called upon to pay, and paid to C. and D. 22,000*l.* on account of the principal, and several sums on account of the interest of A.'s debt. In a suit for the administration of the estate of A., the executors of B. were allowed interest only on 22,000*l.*, but not on the sums of money paid to C. and D. for the interest of the original debt (*a*).

A surety is not entitled to contribution from his co-sureties for the costs of defending an action brought against him by the creditor (*b*), unless the co-surety had authorized him to defend the action (*c*), for the surety, upon being applied to by the creditor, and having no defence, should have paid the debt demanded of him, by which the costs could not have been incurred: but it seems he would be entitled to a proportion of the costs of the writ (*d*).

A surety is not entitled to the costs of defending an action by the creditor, merely because he had received an indemnity from his co-sureties (*e*).

The surety may be deprived of his remedy against his securities for contribution, if he allows the time which constitutes prescription, or bars the remedy under the Statute of Limitations, to elapse without prosecuting his remedy (*f*).

If, during the interval between filing a bill in Chancery by a surety for contribution and the decree, the surety has caused any of the funds of the principal or of the sureties to have been lost by his laches, in not having prosecuted his suit with proper effect, it seems that his claim for contribution would be defeated to the extent to which his sureties, against

(*a*) Rigby *v.* M'Namara, 2 Cox's cases, 490.

(*b*) Gillet *v.* Rippon, Mood. & M. 406. Knight *v.* Hughes, Mood. & M. 247. S. C. 3 Car. & P. 467. Roach *v.* Thompson, Mood. & M. 487, and Bleaden *v.* Charles, 7 Bing. 246.

(*c*) Knight *v.* Hughes, *supra.*

(*d*) Gillet *v.* Rippon, Mood. & M. 406.

(*e*) Ibid.

(*f*) Voet, lib. 46, tit. 1, n. 30, Hering de Fidej. c. 27, p. 4, n. 44.

whom relief is sought, may have suffered in consequence of such laches or neglect (*g*). But no objection could be sustained after a decree has been pronounced, because the co-sureties are equally capable of prosecuting the suit (*h*).

The surety in a bond is not deprived of his right to contribution by his co-sureties, because time for payment has been given to him at his request by the creditor without the knowledge of his co-sureties (*i*).

It is no answer to the claim of the surety, that by his conduct towards the principal he had encouraged him in gaming and other irregularities, and that he knew the principal must be making use of the public money, such use of the public money being a default against which the surety had undertaken.

It was argued, that the author of the loss ought not to have the benefit of a contribution.

The Court in answering this argument observed, that no cases had been cited to this point, nor any principle which applied to this case: "It is not laying down any principle to say that his ill-conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense. In a moral sense, the companion, and perhaps the conductor of the principal, may be said to be the author of the loss, but to legal purposes, the principal himself is the author of it: and if the evil example of the surety led him on, this is not what the Court can take cogni-

(*g*) Onge *v.* Truelock, 2 Moll. 31.
(*h*) Ibid.
(*i*) Dunn *v.* Slee, Holt's N. P. Cas. 399. 1 J. B. Moo. 2.

zance of. Cases indeed might be put in which the proposition would be true. If a contribution were demanded from a ship and cargo for goods thrown overboard to save the ship; if the plaintiff had actually bored a hole in the ship, he would in that case be certainly the author of the loss, and would not be entitled to any contribution. But speaking of the author of the loss is a mere figure of speech as applied to the principal in this case (*j*).

(*j*) Deering *v.* Lord Winchelsea, 1 Cox's Cas. 318.

BOOK VI.

CHAPTER I.

CREDITORS AND DEBTORS IN SOLIDO—JOINT AND SEVERAL OBLIGEES, COVENANTEES, OBLIGORS, AND COVENANTORS.

Creditors and debtors *in solido* comprehended under the title in the Civil Law *de duobus reis constituendis*.—The creditors *rei correi stipulandi* or *credendi*.—Debtors *correi promittendi* or *debendi*.—Nature and distinctive qualities of an obligation *in solido*.—These principles adopted in the different Codes of Europe.—Code Civil.—Law of England.

A CONSIDERATION of the nature of joint and several contracts or obligations *in solido*, and of the rights and liabilities of the parties to them seems necessary for the purpose of rendering more complete the investigation of the law of suretyship and of the rights and obligations derived from it.

Obligations *in solido*, or, to use an expression in English law, joint and several obligations, form the subject of the title *de duobus reis constituendis* in the civil law. The term *reus*, commonly used to signify a defendant or a party accused of a crime, is here intended to express, as well *eum qui agit*, as *eum qui se defendit* (*a*); as well the person to whom the obligation is made, as the person by whom it is made, the covenantee or obligee, as well as the covenantor or obligor: "Reus à re nomen invenit. Rei dicuntur omnes, quorum res agitur." "Originem tamen proprietatemque verborum spectando, non minùs Reum dicimus, qui agit, atque eum,

(*a*) Inst. lib. 3, tit. 17. Dig. lib. 45, tit. 2. Cod. lib. 8, tit. 40. Burgund. de Duobus Reis, c. 1.

qui se defendit. Hinc duo Reorum genera, credendi et debendi (*b*).

The terms used in the Civil Law to designate the joint obligees, or creditors are *Rei stipulandi* or *credendi*, and the obligors or debtors, *Rei promittendi* or *debendi*. "Qui stipulatur *reus* stipulandi dicitur; qui promittit, *reus* promittendi habetur" (*c*).

"Quod si duo pluresve idem stipulentur, *correi* stipulandi dicuntur; si duo pluresve idem promittendi, dicuntur correi promittendi."

The form presented by Wissenbach for the constitution of an obligation *in solido* has long since fallen into desuetude. Persons may be constituted creditors or debtors *in solido* by any lawful contract, provided it is apparent that the debtor singulorum creditorum personam intuitum in solidum vel singulorum promissorum fidem in solidum secutum esse creditorem (*d*). Voet lays down the same rule (*e*). "Denique ex eo, quod in solidum singulos debere, singulisque deberi necesse est sponte patefecit, non protinus duos debendi vel credendi reos esse, qui rem eandem stipulantur aut promittunt, sed requiri, ut amplius constet, *eos voluisse* duos debendi vel stipulandi reos esse. Hinc cum, tabulas esset comprehensum *illum et illum centum aureas stipulatos*, neque adjectum, ita ut duo rei stipulandi essent, virilem partem singuli stipulati videntur; et e contrario cum ita cautum inveniretur, *tot aureos recte dari stipulatus est Vitius, spopondimus ego et Sejus*, viriles tantum partes deberi Papinianus censuit: quia non erat adjectum, singulos in solidum spopondisse, ita ut duo rei promittendi fierent" (*f*).

(*b*) Burgund. de Duobus Reis, c. 1.

(*c*) Pothier ad Pand. lib. 45, tit. 2, Art. 1.

(*d*) Inst. lib. 3, tit. 17, § 1. Burgund. ib. c. 2, n. 6. Voet, lib. 45, tit. 2, n. 3.

(*e*) Voet, ib. n. 2.

(*f*) Dig. lib. 45, tit. 1, l. 11.

Ex quibus etiam satis intelligi potest, in dubio præsumendum haud esse quod duo debendi vel credendi rei constituti sint (*g*).

Eoque nititur, quod receptum scribunt, duos debendi reos nunc non teneri singulos in solidum, nisi hoc specialiter pactum fuerit."

The Code Civil adopts the same principle.

"La solidarité ne se présume point, il faut qu'elle soit expressement stipulée" (*h*).

In order to constitute two or more persons creditors in *solido*, or two or more persons debtors in *solido*, it is necessary as to the former that *one and the same sum*, or *one and the same act* is to be paid or performed to two or more persons, and with respect to the latter, that *one and the same sum* is to be paid, or *one and the same act* is to be performed to the same person by two or more persons. If the subjects of the obligation be different, it is not an obligation in respect of which they are creditors or debtors in *solido*, but the rights of the creditors as well as of the debtors are several, and they constitute distinct and separate obligations.

The sum must be contracted to be paid to two or more, by the same person, or by two or more to the same person (*i*).

The whole sum must be owing to each and every of the persons, and be owing by each and every of the debtors.

Another essential requisite to constitute an obligation in *solido is ut una sit obligatio, una summa* (*j*).

Inequalitas enim quantitatum facit inæquales ac proinde dispares obligationes cum tot sint diversæ stipulationes, quot res diversæ (*k*).

(*g*) Wissenbach ad Pand. ad h. tit. n. 25. Groeneweg. Cod. ad h. tit. lib. 8, tit. 40.

(*h*) Art. 1202.

(*i*) Dig. lib. 45, tit. 2, l. 15. Burgund. ib. c. 1, n. 2.

(*j*) Ibid. l. 3. Burgund. ib.

(*k*) Ferriere ad Inst. lib. 3, tit. 17.

The Code Civil thus defines the nature of the obligation in *solido* (*l*). "L'obligation est solidaire entre plusieurs créanciers lorsque le titre donne expressement à chacun d'eux le droit de demander le paiement du total de la créance, et que le paiement fait a l'un d'eux libère le débiteur, encore que le bénéfice de l'obligation soit partageable et divisible entre les divers créanciers." In this sense is the obligation understood in the different States of Europe, and in Lousiana (*m*).

In addition to those requisites for the constitution of an obligation in *solido* which have been already enumerated, it is necessary that the obligation of each of the obligants should be principal obligations, and not the one accessory to the other. In this respect a debtor in *solido*, is distinguished from a surety (*n*). "Requiritur in his aliquid amplius. Et quid obscero? hoc nempe ut æquè principaliter omnes promittant. Debent enim esse obligationes ejusdem potestatis. Nam si altera sit alterâ plenior, hoc est una principalis, altera accessoria: is, qui in sequelam obligatus erit, fidejussor dicitur. Unde si decem stipulatus sis à Titio, postea quanto minus ab eo consequi posses, à Mevio stipuleris, non sunt duo rei."

It is essentially requisite that all the debtors should be obliged to the performance of the same thing. It is therefore, not one obligation in *solido*, but two obligations, when two persons oblige themselves to another for different things. But provided they are each obliged *totally for the same thing*, though they are obliged differently, they are still debtors in *solido*, *correi debendi*: as if one is obliged purely and simply, and the other subject to a condition or a term of payment, or if they are obliged to pay in different places (*o*).

Notwithstanding these opposite qualities in one and the

(*l*) Art. 1197.
(*m*) Louisiana Code, Art. 2083, 86.
(*n*) Burgund. ib. n. 8.
(*o*) Dig. lib. 45, tit. 2, l. 7, l. 9.

same obligation, that it should be conditional as to one and pure and simple with respect to the other, yet the obligation in *solido* is one indeed with respect to the thing which is the object and subject-matter of it, but it is composed of as many different liens as there are different persons who have contracted it: and those persons being different from each other, the liens which oblige them are so many different liens which consequently may have different qualities. This is the meaning of Papinian, etsi maxime parem causam suscipiunt, nihilominus in cujusque personâ, propria singulorum consistit obligatio (*p*).

The obligation is one with respect to its object, which is the thing due; but with respect to the persons by whom it is contracted, it may be said that there are as many obligations as there are persons bound.

The doctrine of the law of England is, that where a person covenants with two or more, and with each of them; if each of the covenantees takes a several interest or estate, the covenant is several; but if the covenantees take a joint interest in the subject-matter of the covenant, it is a joint covenant. As if a man by an indenture demises to A. Black Acre, to B. White Acre, to C. Green Acre, and covenants with them and every of them, that he is lawful owner of all the said acres; in that case as the interests are several and distinct, the words "every of them," will make the covenants several. But if the three acres had been demised to them jointly, then the words "every of them" would have been void. For a man by his covenant (unless in respect of his several interests) cannot make it first joint and then several by means of the words "every of them." Because, although several persons may bind themselves, and every of them, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to them, and to each of them, to make it joint or several at the

(*p*) Dig. lib. 45, tit. 2, l. 9. Poth. Tr. des Oblig. p. 2, c. 3, Art. 8, § 1.

election of several persons, for one and the same cause, for the Court would be in doubt for which of them to give judgment; also the covenantor would be several times charged with one and the same thing and therefore the words, "and every of them" are in such case of no effect, and do not sever the joint cause of action (*q*).

So, where two bound themselves, or any of them, their heirs, executors, or either of their heirs, &c., and the obligation was sealed and delivered by both of them jointly; this was held to be a joint and several, and not a joint bond only; and that the words *vel* should be understood the same as *et*. And that therefore, the joint delivery and acceptance could not make that joint only, which by the words was joint or several at the election of the obligee (*r*).

If three enter into an obligation, and bind themselves in the words following, "Obligamus nos et certumque nostrum per se pro toto et in solido," these make the obligation joint and several. If three are bound in a bond by these words, "Obligamus nos et quemlibet nostrum conjunctim," this is a joint obligation, and one of them alone cannot be sued, for the word *conjunctim* makes the obligation joint, which the word *quemlibet* cannot make several, being inserted for no other purpose but to express more strongly that they should be all bound, not that they were to be severally bound (*s*).

But a joint bond was held several as well as joint against creditors in the administration of assets, where the intention of the parties was admitted, and it was decreed to be paid as a specialty debt, out of the estate of one of the obligors (*t*).

(*q*) Slingsby's case, 5 Co. 18. Eccleston *v.* Clipsham, 1 Saund. 153. Johnston *v.* Wilson, Willes, 248. Anderson *v.* Martindale, 1 East's Rep. 498. Foley *v.* Addenbrooke, 3 G. & D. 64. Hopkinson *v.* Lee, 14 L. J. Q. B. 101. Bradburne *v.* Botfield, 14 M. & W. 569. Shep. Touchst. 166.

(*r*) Cro. Jac. 322. Hawkinson *v.* Sandilands.

(*s*) More, 260, pl. 407; 3 Leon. 206. Wigmore *v.* Wells. Spence *v.* Durant, 1 Show. 8, S. P.

(*t*) Burn *v.* Burn, 3 Ves. 573. Ex parte Symonds, 1 Cox, 275.

Davis executed a bond as the joint and several bond of himself and Marsh, and signed it Davis and Marsh, but Davis had no authority from Marsh to do so; it was held good as the several bond of Davis, for the sealing and delivering is sufficient alone, without signature; and if it had been necessary, the Court would have held Davis to have described himself "Davis and Marsh," and to be estopped for showing that his name was Davis only (*u*).

If, by indenture between three on the one part, and two of the other, the two covenant jointly and severally to perform a certain act, and the three likewise covenant jointly and severally with the said two, that, after the performance of the said act, they will pay the said two a certain sum of money, &c. and then follow these words, viz.: "Pro vera et reali performatione omnium articulorum et agreamentorum prædictorum alternatim una partium prædictorum obligavit se, hæredes, executores, administratores, et assignatos suos, in et subter penalitatem sexaginta librarum sterlingarum:" an action of debt for the 60*l.* on this last clause cannot be brought against one of them only, being only joint, and not joint and several (*v*).

(*u*) Elliot *v.* Davis, 2 Bos. & Pul. 338.
(*v*) 2 Roll. Abr. 149.

CHAPTER II.

CREDITORS IN SOLIDO.—JOINT AND SEVERAL OBLIGEES OR COVENANTEES.

What is necessary to constitute them creditors *in solido*.—Their rights against the debtor.—Effect of payment to one.—Of *novation delegation acceptilation*.—Compensation with one of the co-creditors.—Confusion.—Interruption of prescription as to one.—These rules prevail in Europe.—Code Civil.—Law of England.

THE effect of an obligation by which the obligees are constituted creditors *in solido* is, that the whole sum being due to each as truly as if there was only one obligee or creditor, if one receives the payment of the debt, the other creditor *in solido* has no title to demand it. The obligation made to all is an obligation for one sum only, and that sum being once paid by the debtor to one of the joint creditors, it is a payment to, and a discharge as between the other co-creditors and the debtor. The payment therefore made to one of the creditors *in solido perimit obligationem*. If one of the creditors has obtained it by execution, the co-creditor has no right against the debtor to recover payment, because the other *totam rem occupat*.(*a*).

The payment to the one has the effect of destroying the claim of the others, in consequence of the presumption that he who receives it is not accountable to the other for what he receives, and that he has only received that which is due to himself. It is otherwise when one of the creditors, by an

(*a*) Dig. lib. 45, tit. 2, l. 2; lib. 32, p. 3, l. 12, §. 21. Dig. lib. 44, tit. 7. See Poth. ad Pand. lib. 45, tit. 45, ff. 2; ad c. 2, c. note 3. Ferriere ad Inst. lib. 3, tit. 17, ff. 2. Burgund. de Duob. Reis. c. 17, n. 6.

agreement with his debtor, remits the debt to his debtor. He does not by such remission prejudice his co-creditors, because this agreement does not *pleno jure* extinguish the obligation; it has operated to the prejudice of himself alone (*b*).

With respect to the other modes by which an obligation may be discharged, as by novation, delegation, acceptilation, and transactio, the doctrine of Burgundus is, that if both the co-creditors have a common interest in the subject of the obligation, the novation, delegation, acceptilatio, or transactio would affect only him with whom they had taken place, and would not prejudice the co-creditors (*c*). In support of this distinction, he cites the following text: "Si unus ex argentariis sociis cum debitore pactus sit: an etiam alteri noceat exceptio? Neratius Atilicerius, Proculus, nec si in rem pactus sit, alteri nocere: tantum enim constitutum, ut solidum alter petere possit. Idem Labeo: nam nec novare alium posse, quamvis ei recte solvatur. Sic enim et his, qui in nostra potestate sunt, recte solvi, quod crediderint, licet novare non possint: quod est verum. Idemque in duobus reis stipulandi dicendum est" (*d*).

But when there is no such common or joint interest in the subject of the obligation, either in respect of the relation of the co-creditors to each other, or from the nature of the subject for which the obligation is given, the novation, delegation, acceptilation, transactio, or compromise with the one would also prejudice the other creditor. This distinction is, however, denied by Voet, who insists that in all cases they have the same effect as payment. "Quod autem operatur solutio aut exactio per unum aut uni ex pluribus debendi credendive reis facta, idem etiam acceptilatio novatioque facit; cum fere con-

(*b*) Ferriere ad Inst. lib. 3, tit. 17, l. 2. Burgund. de Duob. Reis, c. 17. Dig. lib. 2, tit. 14, l. 27. Vinnius ad Inst. lib. 3, tit. 17.

(*c*) Burgund. ib. c. 17. Dig. lib. 2, tit. 14, l. 27. See Poth. ad Pand. lib. 2, tit. 14, l. 27. See note.

(*d*) Dig. lib. 2, tit. 14, l. 27.

venerit, unius acceptilatione, et novatione cum uno reorum debendi vel credendi facta, totam omnium reorum intuitu perimi obligationem: ex nova vero obligatione per novationem inducta nullam inter alios, sed inter solos novantes, jus nasci"(*e*). With reference to the text just cited, he says that the words there used "referenda sint ad id, quod in principio legis definitum fuerat pactum unius ex argentariis sociis cum debitore, reliquis hand nocere quibus deinde subjicitur *idemque in duobus stipulandi reis dicendum esse*, adeoque nihil aliud ea lege significatur, nisi quod pactum unius de non petendo non noceat alteri; et merito; quia pacto obligationes ipso jure non tolluntur, sed tantum ope exceptionis pacti repellitur ille, qui pactus est, non item cæteri, cum quibus pactum factum non esse: quæ et ratio fuit, quod non aliter is, cui liberatio legata erat, acceptilatione, liberandus fuerit, quam si adversus omnes, obligatio vi liberationis relictæ perimenda esset; at ubi contra quosdam obligatio vires retinere debebat, pacto potius negotium liberationis expediendum fuerit"(*f*).

Pothier maintains the same opinion. Relying on the rule that a person to whom a debt may be paid may in general make a novation *cui recte solvitur, is etiam novare potest*, he considers that one of several creditors *in solido* may make a novation. Merlin has collected the arguments in support of the negative.

The Code Civil seems to consider that it is by payment only to one of the creditors *in solido* that the demand of the other is extinguished (*f*).

A debt, owing to one of the joint debtors by one of the co-creditors, can only be set-off against the co-creditor by whom it is owing, if the latter be suing that debtor; but the debtor

(*e*) Voet, lib. 45, tit. 2, n. 5.

(*f*) Voet, lib. 45, tit. 11, n. 5. Digest. lib. 46, tit. 12, l. 10, l. 31. Wissenb. ad lib. 46, tit. 10. Code Civil, Art. 1198. Merlin Rep. tit. Novation.

cannot set it off if the action were brought by the other co-creditor (*g*).

Neither can one of the debtors set off a debt owing by the creditor by whom he is sued to his co-debtor (*h*).

The effect of one of two creditors succeeding as heir to the other; is not by confusion to extinguish the obligation, but to convert it into two obligations, and the reason assigned is, "Quia, ubi duæ ejusdem potestatis obligationes sunt, seu æque principales, non potest reperiri, utra per alteram finitura seu consumenda sit, et ob id utramque manere necesse est" (*i*).

So, if one of the creditors should become the heir of the debtor, its effect would be personal to himself, but the obligation would not be extinguished (*j*).

If prescription has been interrupted by one of the creditors *in solido*, the other creditor has the advantage of such interruption, and the obligation remains in force for both. But if the interruption had been effected by a suit in which the creditor had demanded only his part of the debt, the interruption would not avail the other creditor (*k*). The Code Civil adopts the same doctrine: "Tout acte qui interrompt la prescription à l'égard d'un des créanciers solidaires, profite aux autres créanciers" (*l*).

There are two conusees of a statute, and one of them releases to a conusor: this shall extinguish the statute as to the other also (*m*).

So, if the executors sell the goods of the testator for a certain sum of money, and take an obligation for the money, the release of one of them shall bar both (*n*).

(*g*) Dig. lib. 45, tit. 2, l. 10. Voet, lib. 16, tit. 2, n. 7. Burgund. ib.
(*h*) Dig. ibid. Burgund. ib. n. 30. Voet, lib. 16, tit. 2, n. 7.
(*i*) Ibid. lib. 45, tit. 2, l. 13. Voet, ib. n. 5, lib. 46, tit. 1, l. 5.
(*j*) Ibid.
(*k*) Voet, ib. n. 6.
(*l*) Art. 1199.
(*m*) 2 Roll. Abr. 411.
(*n*) Bac. Ab. tit. Release, G. 17 E. 66. 2 Roll. Abr. 411.

But if A. be bound to B. and C. *solvendum*, the moiety to B. and the other to C., this is a several obligation, and the release of one shall not prejudice the other.

So, where several enter into several covenants in the same deed, a release to one of the covenantors will not discharge the others (*o*).

So, if two are bound to the King, and he releases one of them, this will not discharge the others (*p*).

The interruption of the prescription by an acknowledgment to one of the joint creditors, would have the effect of preventing the Statute of Limitations running against the co-creditor (*q*).

(*o*) Cro. Eliz. 408, 470. 2 Salk. 574.
(*p*) Bac. Abr. ibid.
(*q*) White *v.* Williams, 1 W. W. & D. 52.

CHAPTER III.

JOINT AND SEVERAL DEBTORS.

SECTION I.

An obligation *in solido* is not to be presumed.—If such is intended to be the nature of the obligation, it ought to be expressed.—Exception as to partners.—Doctrine of the law of England.—Exception as to tutors and guardians.—Right to sue either or all.—Whether any benefit of division.—Effect of judgment in favour of one or more.—Novation, delegation, and acceptilation.—Compensation or set-off.—Judgment in favour of.—Confusion.—Prescription.—Law of France.—Code Civil.—Release or renunciation of the solidity.—Express or implied rights of co-debtors amongst each other.—For contribution.—Cession of actions.

THE obligation is not presumed to be *in solido*, but it ought to be expressed, and if it be not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part only (*a*). And this is confirmed by Justinian in the Novel, 99: "Si quis alterna fidejussione obligatos sumat aliquos, si quidem non adjecerit, opportere, et unum horum in solidum teneri, omnes ex æquo conventionem sustinere. Si vero aliquid etiam tale adjiciatur, servari quidem pactum."

According to this principle, if an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor; the fourth, by ratifying the sale, is not to be considered as having sold *in solido* with the others: for, although the three had promised

(*a*) Dig. lib. 45, tit. 2, l. 9, ff. 2. Pothier, Tr. des Oblig. Part 2, ch. 3, § 2.

that he should accede to the contract of sale, it was not expressed that he should accede *in solido* (*c*).

The Code Civil adopts this principle: "La Solidarité ne se présume point, il faut qu'elle soit expressément stipulée (*d*).

"Cette règle ne cesse que dans le cas où la solidarité a lieu de plein droit, en vertu d'une disposition de la loi."

The concluding part of the preceding article recognizes an exception adopted by the civil law in the case of partners, tutors, and others (*e*). Thus, partners contracting an obligation in respect of their joint concern, become bound *in solido*.

This is the decision of the law of France. Ordonnance du Commerce of 1763 (*f*).

Two merchants who buy together a lot of merchandize, although there is not any other partnership between them, are considered as being in partnership with respect to that purchase; and as such are obliged *in solido*, although it is not expressed. This was adjudged in the Parliament of Thoulouse, and has become a general maxim.

Such is the rule expressed in the Code Civil, and it is the doctrine of the several codes in Europe.

The law of Scotland treats the partners as being bound *singuli in solidum* (*g*).

By the law of England the obligation of the partners is joint, and at law both must be sued, but the estate of a deceased partner is liable in equity to the creditors of the firm, although the legal remedy exists only against the survivors. Sir William Grant, in *Vulliamy* v. *Noble* (*h*), (and he had

(*c*) Poth. ib.

(*d*) Art. 1202.

(*e*) Art. 1202, 1222, 1887, 2002. Code de Comm. 22, 28, 140.

(*f*) Ordon. du Comm. 1673, tit. 4, Art. 7.

(*g*) Pothier, ib. Code Civil, Art. 1202, 1222, 1887, 2002. Code de Comm. Art. 22, 28, 140, c. 2. 2 Bell. Com. 618.

(*h*) 3 Meriv. 619.

much considered the question), in Sleech's case in *Devaynes* v. *Noble* (*i*), says, "The deceased partner's estate must remain liable in equity until the debts which affected him at the time of his death have been fully discharged. There are various ways in which the discharge may take place, but discharged they must be before his liability ceases." The discharge may be by direct payment, or by dealings with the continuing partner operating as payment of the joint debt, or in the terms of *Thompson* v. *Percival*, the dealings may arise from the creditors having agreed to take and taking the security of the survivor in satisfaction of the joint debt; or there may be an equitable bar to the remedy, for (as Lord Eldon expresses it in *Ex parte Kendall* (*j*)—"As the right stands only upon equitable grounds, if the dealing of the creditor with the surviving partners has been such as to make it inequitable that he should go against the assets of the deceased partner, he will not, upon general rules and principles, be entitled to the benefit of the demand" (*k*).

In the United States of America the doctrine is, that the surviving partner is alone suable at law; but relief may be had in equity against the representatives of the deceased partner having assets, if the surviving partner be insolvent (*l*): and there, as in England, a partnership contract, upon the death of a partner, is in equity to be considered joint and several, and to be treated as the several debt of each partner (*m*). A joint

(*i*) 1 Meriv. 565. (*j*) 17 Ves. 514.

(*k*) Winter *v.* Innes, 4 M. & Cr. 109. See Lord Chancellor Cottenham's judgment.

(*l*) Simpson *v.* Vaughan, cited in 2 Vesey, 101. Jenkins *v.* De Grot, 1 Caine's cases in Error, 122. Van Reimsdyke *v.* Kame, 1 Gall. Rep. 371, 630. Hamersley *v.* Lambert, 2 Johns. Ch. Rep. 508. Wilder *v.* Keeler, 3 Paige, 167.

(*m*) Vulliamy *v.* Noble, 3 Meriv. 593. Story on Partnership, 321. Wilkinson *v.* Henderson, 1 Mylne & Keene, 582. Devaynes *v.* Noble, 1 Meriv. 529. Sleech's case, ib. 563. Collyer on Partnership, 343-46. Rumner *v.* Powell, 3 Meriv. 37. Winter *v.* Innes, *supra*.

creditor may file a bill against the representatives of a deceased partner, though the survivor be not insolvent. He is not compelled to sue the survivor in the first instance (*n*).

Tutors and guardians are, in respect of their offices, bound *in solido*, although not so expressed; the obligation contracted by several tutors undertaking the same tutelage, or by several persons engaging in some public administration, is an obligation *in solido* (*nn*).

Tutors who had not acted were entitled to the benefit of order or discussion, and the minor, whose tutelage had expired, was bound to proceed at their risk against those who had acted; tutors who had acted were entitled to the benefit of division whilst they all continued solvent (*nn*). But these exceptions were not admitted by the law of France (*o*).

By the law of England the liability of guardians, executors, and trustees *in solido*, would depend on their participation in the default of their co-guardians, co-executors, and co-trustees.

The effect of the obligation *in solido* is to entitle the creditor to recover the whole debt from either of the debtors whom he pleases to select; this is a necessary consequence of each of the debtors being a debtor for the whole (*p*).

But the creditor, by proceeding against one of the debtors, does not discharge the others until he is paid: he may discontinue his action against the first, and proceed against them all at the same time (*q*).

According to the Code Civil, "Les poursuites faites contre l'un des débiteurs n'empêchent pas le créancier d'en exercer de pareilles contre les autres" (*r*).

The debtor of whom the creditor makes his demand was

(*n*) Winter *v.* Innes, *supra*. (*nn*) Voet, lib. 27, tit. 8, n. 6.
(*o*) Poth. ib.
(*p*) Voet, lib. 45, tit. 2, n. 4. Poth. ib.
(*q*) Cod. lib. 8, tit. 41, f. 28. Voet, ib. Burgund. de Duob. Reb. c. 17.
(*r*) Code Civil, Art. 1204.

not entitled under the Civil Law to the benefit of division. It has been considered that the 99th Novell of Justinian applied only to sureties: but Burgundus insists that it applies to debtors *in solido*. He at the same time admits that it has not the effect of making the obligation separate, that the obligation is still *in solido*, but that the creditor ought to proceed against each for their respective parts, until it is ascertained whether they are all competent (*s*). Voet considers that the benefit of division could not be claimed by debtors *in solido*, but that in Holland a relaxation took place, and it might be claimed by them (*t*). Pothier is of opinion it was not admitted by the law of France. The Code Civil expressly refuses it: "Le créancier d'une obligation contractée solidairement peut s'adresser à celui des débiteurs qu'il veut choisir, sans que celui-ci puisse lui opposer le bénéfice de division" (*u*).

The benefit of division is not admitted by the Law of Scotland.

In England no such benefit is recognised. If the obligation is joint all the obligors must be proceeded against, and the obligee cannot select either if they are living. If the bond be joint, or joint and several, the obligee may sue them all jointly or severally at his election, but if three or more bind themselves jointly and severally, the obligee cannot sue two of them only, jointly, unless the other obligors are dead (*v*).

By the law of England if two are jointly and severally bound in an obligation, and the obligee releases to one of them, both are discharged. The obligee releases to one obligor, the other in consideration of the forbearance undertakes to pay it; it was held that the debt was absolutely discharged (*w*).

(*s*) Burgund. de Duob. Rebus, c. 28.

(*t*) Voet, ib. n. 4.

(*u*) Pothier, ib. Code Civil, c. 1203.

(*v*) Bac. Ab. tit. Obligation. Hard. 198. Cro. Eliz. 494. Sand. 291. Sid. 238, 420. Allan, 21, 41. Cro. Jac. 152. Keb. 840, 936.

(*w*) Parker *v.* Sir George Lawrence, Hob. 70. Co. Litt. 232, n. 26. H. 6, 34 H. 6.

The release must be express, and not merely a constructive release. Therefore, a covenant not to sue one of the obligors, and that if sued, the covenant shall be an effectual release, and may be pleaded in bar, does not release the other obligor; for although a covenant not to sue a sole obligor operates as a constructive release, in order to prevent circuity of action, yet the covenant is not to all effects the same as an express release. Therefore, it has not the same effect as to another obligor to whom the covenant does not apply (*y*).

A bond made to secure a just debt, payable with lawful interest, will not be avoided by reason of usury, or any corrupt agreement between the obligors, to which the obligee was no way privy; as where A. being indebted to B. in 100*l.* agrees to give him 30*l.* for the forbearance of that 100*l.* for a year, and gives him a bond of 60*l.* for payment of the 30*l.*, and for payment of the 30*l.* and of the 100*l.* enters into a bond of 200*l.* together with B. for payment of a true debt of 100*l.* due from B. (*z*).

The general rule of the Court of Equity is that where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other in taking the account, and because the debtors are entitled to a contribution, where one pays more than his share of the debt. A farther reason is, if there are different funds, as where the debt is a specialty, and the plaintiff may sue at law either the heir or executor for satisfaction, he must make them both parties as he may come in the last place against the heir, for instance, if there are no personal assets at all; but if this fact appear plainly in the cause, there is no reason to bring the representative of that co-obligor before the Court (*a*).

(*y*) Bac. Abr. ib. Solly *v.* Forbes, 2 Brod. & B. 38.

(*z*) And. 121. Moore, 752, pl. 10, 35. Cro. Jac. 32, 33. Yelv. 47.

(*a*) Collins *v.* Griffith, 2 P. Wms. 313. Angerstein *v.* Clark, 2 Dick. 738. Madox *v.* Johnston, 3 Atk. 406.

Besides the extinguishment of the obligation by payment or by release, by deed, the obligation may become discharged in law: Thus, if several obligors are bound jointly and severally, and the obligee makes one of them his executor, it is at law a release of the debt, and the executor cannot sue the other obligor, but in equity the debt remains assets, in his hands to pay both debts and legacies (*b*).

A. and B. were jointly bound to J. S., who made the wife of A. executrix and died. The effect of making the wife of one of the obligors executrix is to discharge the other obligor (*c*). And it would be the same if they were bound jointly and severally. The reason is because a debt or personal thing once suspended is gone for ever, and here the plaintiff one of the obligors is discharged, for he and his wife cannot sue himself, and of that the other shall take advantage. But this debt due by the husband would be assets in his hands and liable to the creditors (*d*).

The marriage of a feme sole obligee with one of the obligors is said to be a release in law of the debt, being her own act.

If one obligor makes the executor of the obligee his executor, and leaves assets, the debt is deemed satisfied; for he has power, by way of retainer, to satisfy the debt; and neither he nor the administrator *de bonis non* of the obligee can ever sue the surviving obligor. If two are bound jointly and severally to A., and the executor of one of them makes the obligee his executor, the obligee may sue the other (*e*).

It follows as a consequence of the principle that a debt in *solido* is only one debt of the same thing, of which there are

(*b*) Bac. Ab. ib. Cro. Car. 373. Yelv. 160.

(*c*) Hob. 10. Fryer *v.* Gildridge, 21 E. 4, 81. Bro. Exec. 118.

(*d*) Dyer, 140. Co. Litt. 264-6. 11 H. 7, 4, 6. 1 Roll. Abr. tit. Extinguishment, 940. Moor. 855, pl. 1174. 1 Cro. 272. Dorchester *v.* Webb, Yelv. 160. Flud *v.* Ramsay, 8 Co. 136. 2 Co. 136, a. March. 128. Hob. 10. 1 Bac. Ab. ib.

(*e*) 2 Lev. 74.

several debtors, that the payment by one of the debtors liberates the others (*f*).

Not only a real payment, but that which is equivalent to payment has the same effect; novation or transaction or compromise by one of the debtors in *solido* discharges the others. So if one of the debtors in *solido* is sued by the creditor, and opposes in compensation of the debt demanded, a like sum owing to him from the creditor, the others are liberated by this compensation as well as by a real payment (*ff*).

But if the debt had been owing by the creditor, not to the debtor, whom he was suing, but to his co-debtor, he cannot oppose by way of compensation, to the payment of this money, the debt owing to that other co-debtor. "Si duo rei promittendi socii non sint, non proderit alteri, quod stipulator alteri reo pecuniam debet" (*g*).

The Code Civil confines the opposition of compensation to the former case. "Le débiteur solidaire ne peut pareillement opposer la compensation de ce que le créancier doit à son codébiteur" (*h*).

The same principle is adopted in the law of Scotland (*hh*). But the statutes of set-off in England do not admit of set-off of a separate against a joint debt, although cases may arise in which, in consequence of an agreement express or implied, a Court of Equity would permit such set-off.

By the New York statute of April 18, 1838 (*i*), entitled "An Act for the relief of partners and joint debtors," on the dissolution of any co-partnership firm, by consent or otherwise, any individual thereof may make a fair compromise with all or

(*f*) Burgund. de Duob. Reb. c. 17, n. 1. Voet, lib. 45, tit. 2, n. 4.

(*ff*) Burgund. ib. c. 53, 54. Voet, ib. Poth. Tr. des Oblig. Part 3, ch. 2, Art. 8, s. 3.

(*g*) Dig. lib. 45, tit. 2, l. 10. Voet, lib. 45, tit. 2, n. 4. Poth. Tr. des Cont. ib. Burgund. ib. c. 57.

(*h*) Art. 1294.

(*hh*) 2 Bell, 668.

(*i*) 19 Johnson, 143.

any of the creditors, and obtain a discharge, as far as respects himself only; but such composition or compromise shall not impair the right of the creditor making it to his remedy against the other members of the firm, nor impair the right of the other co-partners to call on such partner for his rateable proportion of such partnership debt. This statute provision extends equally to joint debtors, any one of whom may compound for his joint liability under the same limitations.

The release of the creditor to one of the debtors would also liberate the others, if it appeared that the creditor intended thereby to extinguish the debt as to the whole (*j*).

If, however, it appeared that his intention was only to extinguish the debt, as to the part for which the person to whom he gave the release was liable to his co-debtors, and to discharge that one personally from the residue of the debt, the debt would still continue to subsist, as to the residue, in the co-debtors (*k*).

If the creditor, in the discharge which he gave to his co-debtor, expressly declared that he intended only to discharge the person of the particular debtor, and to retain his claim against the others, he could not, by virtue of this declaration, require the whole from the other debtors without deducting the part of him who was discharged. It is reasonable to conclude that the several debtors would not have bound themselves *in solido*, but would only have engaged for their own respective parts, if they had not considered that on paying the whole they should have recourse against the others, and that for this purpose they would be entitled to a cession of the actions of the creditor for the other parts. It is only under the tacit condition of having this cession of actions that they are obliged *in solido*, and consequently the creditor has no right to demand from any of them the payment of the whole without such

(*j*) Vulliamy *v.* Noble, 3 Merr. 618. Ex parte Rose, Buck. 125. Burgund. c. 5, n. 1. Poth. ib.

(*k*) Burgund. ib. n. 2.

cession. In this case, the creditor having put it out of his power to cede his action against the debtor whom he has discharged, and consequently having incapacitated himself from performing the condition upon which he has a right to demand the whole, it follows that he cannot demand the whole from each of them (*l*).

An acquittance can procure a discharge from the solidity only of the debtor to whom it is given. He is the only one with whom the creditor has treated, and there has been no agreement in this respect between the creditor and the others. He is entitled, therefore, to proceed against the others *in solido*, subject to a deduction of the share of the one who is discharged, and of that proportion to which he would be liable if any of the others were insolvent.

If any of the remaining debtors are insolvent, the others ought to be discharged from the share which the one who was released from the solidity would have borne in the insolvency.

When the creditor has obtained a judgment against the other debtor for the payment of his part of the debt, the sentence does not discharge the solidity of the other debtors, *cum res judicata aliis non prosit.* But they can require that if any of them is insolvent, the creditor should allow a deduction of the share which the party discharged would have borne in the loss arising from the insolvency.

The Code Civil adopts this principle in the following articles: "Le créancier qui consent à la division de la dette à l'égard de l'un des codébiteurs conserve son action solidaire contre les autres; mais sous la déduction de la part du débiteur, qu'il a déchargé de la solidarité. Le créancier qui reçoit divisément la part de l'un des débiteurs, sans réserver dans la quittance la solidarité au ses droits en général ne rénonce à la solidarité

(*l*) Burgund. ib. Pothier, Part 2, c. 3. Art. 8, § 3. Voet, lib. 45, tit. 2. n. 7.

qu'à l'égard de ce débiteur. Le créancier n'est pas censé remettre la solidarité au debiteur lorsqu'il reçoit de lui une somme égale à la portion dont il est tenu, si la quittance ne porte pas que c'est pour sa part.

" Il est le même de la simple demand formée contre l'un des codébiteurs pour sa part si celui-ci n'a pas acquiescé à la demande, ou s'il n'est pas intervenu un jugement de condemnation (*m*).

"Le créancier qui reçoit divisément et sans réserve la portion de l'un des codébiteurs dans les arrérages ou intérêts de la dette, ne perd la solidarité que pour les arrérages ou intérêts échus et non pour ceux à échoir, ni pour le capital, à moins que le paiement divisé n'ait été continué pendant dix ans consécutifs (*n*).

" L'obligation contractée solidairement envers le créancier se divise de plein droit entre les débiteurs qui n'en sont tenus entre eux que chacun pour sa part et portion (*o*).

"Le codébiteur d'une dette solidaire, qui l'a payée en entier, ne peut répéter contre les autres que les part et portion de chacun d'eux.

" Si l'un d'eux se trouve insolvable, la perte, qu'occasionne son insolvabilité, se répartit par contribution entre tous les autres codébiteurs solvables et celui qui a fait le paiement" (*p*)

" Dans les cas où les créancier a renoncé à l'action solidaire envers l'un des débiteurs si l'un ou plusieurs des autres codébiteurs deviennent insolvables, la portion des insolvables sera contributoirement repartée entre tous les débiteurs, même ceux précédement déchargés de la solidarité par le créancier"(*q*).

" Si l'affaire pour laquelle la dette a été contractée solidairement ne concernait que l'un des co-obligés solidaires celui-ce sera tenu de toute la dette vis-à-vis des autres codébi-

(*m*) Art. 1210, 1211. (*o*) Ibid. 1213.
(*n*) Ibid. 1212. (*p*) Ibid. 1214.
(*q*) Ibid. 1215.

teurs qui ne seraient considerés par rapport à lui que comme ses cautions "(*r*).

The creditor's right of solidity against several debtors of the same debt may, if he be *sui juris*, be renounced by him according to the maxim "cuique licet juri in suam favorem introducto renunciare." He may renounce it, either in favour of all the debtors, by consenting that the debt shall be divided between them, or in favour of any one of them, whom he discharges from the solidity against the others; but so that the discharge of the one shall not operate to the prejudice of the remaining debtors.

This renunciation may be either by an express, tacit, or implied agreement. He is considered to have renounced it tacitly, when he has admitted any one of the debtors to pay for his part by name. "Si creditores vestros ex parte debiti admisisse quemquam vestrum pro suâ personâ solventem probaveritis: aditus Rector provinciæ pro sua gravitate ne alter pro altero exigatur, providebit" (*s*).

The creditor, having given to A. B. one of its joint debtors an acquittance in these terms, "I have received from A. B. the sum of —— for his part," acknowledges him as his debtor for a part, and, consequently consents that he shall not be liable *in solido*, for it would be inconsistent that a person should be debtor for a part and debtor *in solido*.

But if the acquittance expresses that the creditor has received it from the debtor *for his part*, reserving the right of solidity, the terms in which the creditor may reserve his right of solidity, will prevail over the inference that might be drawn from the terms *for his part*, shall be renounced his right of solidity. The expression "*for his part*" is reconcileable with the reservation of solidity, for the creditor means not such a part for which the debtor would be answerable, in respect of him (the creditor),

(*r*) Art. 1216.
(*s*) Cod. lib. 2, tit. 3, l. 18.

but a part for which he could be answerable, in respect of his co-debtors, which part the creditor consents to receive from him at present, saving the right to claim from him the residue which he already has, and which he intends to reserve. This was so adjudged by an *arrêt* of the 6th September, 1712, reported in the 16th volume of the Journal of Audiences.

The expression in the acquittance, "without prejudice to my rights," is even a stronger mode of reserving the right of solidity than that of "without prejudice to the solidity;" for the right of solidity is included in the general terms.

When the creditor has given one of his debtors *in solido* an acquittance purely and simply for a certain sum, which is precisely the amount for which he is liable, as between him and his co-debtors, without expressing that it is *for his part*, there seems no ground for presuming a renunciation of the solidity, and the law *si creditores* ought to be restrained to the particular case, which is, where one of the debtors is expressly admitted to pay for his own particular share, *ex parte pro personâ suâ*, and that it is from the expression in the acquittance, *for his part*, that the presumption of renouncing the solidity arises.

If the demand made upon one of the debtors *in solido* to pay his part includes an intention in the creditors to release him from the solidity, yet, until the debtor has acquiesced in the demand by offering to pay his part, the debtor is not discharged from the solidity, and the creditor is not prevented from increasing his demand against him, for the whole of the debt. This case differs from that of the law *si creditores*, in which the rule of the debtor paying his part of the debt to the creditor, who is willing to be satisfied with it, concurs with that of the creditor for the release of the residue.

When a debtor against whom a demand is instituted for the payment of his part has, before the creditor has increased his conclusions against him, paid his part, or only offered to pay it, there is an entire parity of reason for deciding, as in the law

si creditores, for the release of the solidity. Therefore, in the opinion of Pothier, (*t*) these terms of the law ought to be restrained to the case of a voluntary payment made without the acquittance expressing that the creditor receives it for his part, and ought not to be extended to a payment made in consequence of an action brought against the debtor for the payment of his part.

So, where, upon a demand of a creditor against one of the debtors for the payment of his part, there is a sentence adjudging him to pay his part, the creditor can no longer demand the remainder; the sentence in this case is equivalent to the will of the creditor in releasing the surplus. "Cum in judiciis quasi contrahimus, et judicatum quamdam novationem inducent."

When several parties contract a debt *in solido*, it is only in respect of the creditor that they are debtors of the whole: as between themselves the debt is divided, and each of them is only debtor *pro se*, as to that part of the debt of which he was the cause. Thus, if two persons borrow together a sum of money which they engage *in solido* to repay, if they have equally divided the money borrowed, each of them, although debtor for the whole, in respect to the creditor, is only debtor for a moiety in respect of the other. If the division was unequal, as if one had two-thirds of the money borrowed, and the other only one-third, he who had the two-thirds would, as between themselves, be debtor for two-thirds, and the other for only one-third of the amount. If one of them alone derived a benefit from the contract, and the other was only engaged in his behalf, (pour lieu faire plaisir) the person having the benefit is the only debtor; the other, although a principal debtor, so far as concerns the creditor, is, in respect of his co-debtor, only a surety. If, then, A., B., and C. were obligors,

(*t*) Poth. ib.

and A. only was interested in the cause of the obligation, and B. discharges the debt, and A. becomes insolvent, B., who has paid the whole, would have no action against C. for the moiety (*v*).

The debtor *in solido* who pays the whole has a right to the cession of the actions of the creditor against the other debtors; and the creditor cannot refuse it: but if he has incapacitated himself from ceding them against any one, he has so far given up his rights of solidity (*v*).

If the creditor expressly refuses it, the debtor is, nevertheless entitled to enjoy it without being under the necessity of instituting any process to compel the creditor to grant it; the law in this case supplies what the creditor ought to have done, and gives the debtor, who requires it, a subrogation to all the rights and actions of the creditor (*v*).

The debtor *in solido* who, on paying the debt, requires a subrogation, is, as to the surplus beyond his own share, subrogated, not only against his co-debtors, but also against their sureties, if they have given any to the creditor. He is likewise subrogated to all the privileges and rights of hypothecation attached to the actions of the creditor, and he may even exercise them against third persons, in the same manner as the creditor to whom he is procurator *in rem suam* might have done (*v*).

If an obligation has been contracted in *solido* by four persons, and one of the four has paid the whole of the debt with a subrogation, he can not proceed in *solido* against each of the others, subject only to the deduction of the fourth part for which he was liable, but he can proceed only against each for his fourth. A circuity of actions is thus prevented (*w*).

Although a debtor in *solido* has omitted at the time of pay-

(*v*) Poth. ib.

(*w*) Arrêt. July 22, 1650. Sept. 5, 1674. Journal des Aud. tom. 1, p. 215.

ment to require a subrogation, he is not therefore destitute of all redress; but has on his own account (*de son chef*) an action against each of his co-debtors for the recovery of their several proportions, if they have all equal interests, or if their interests therein are unequal, then according to the share or interest of each. If any one of them is insolvent, the co-debtor who has paid the whole has likewise an action against each of those who are solvent to pay the proportion which they ought respectively to bear of the loss arising from such insolvency, and which each of them ought to contribute *pro rata*, according to the share which he has in the common subject (*x*).

If in consequence of the act or fault of one of the co-obligors the subject in which they were bound in *solido* to have delivered has perished, so that it can not be delivered, the other obligors remain liable to make good the value of the subject. *Factum alterius alteri quoque nocet.* But although this act of the debtor operates against his co-debtors *ad conservandam et perpetuandam obligationem*, yet it does not operate against them *ad augendam ipsorum obligationem.* The obligor whose act or default has occasioned the loss is alone liable to damages resulting from the non-delivery, and his co-obligors are liable only for the value of the subject which ought to have been delivered (*xx*).

The Code Civil adopts this principle: "Si la chose due a péri par la faute ou pendant la demeure de l'un ou de plusieurs des débiteurs solidares, les autres codébiteurs ne son point dechargés de l'obligation de payer le prix de la chose: mais ceux-ci ne sont point tenus des dommages et intérêts. Le créancier peut seulement répéter les dommages et intérêts tant contre les débiteurs par la faute desquels la chose a péri que contre ceux qui étaient en demeure" (*y*).

(*x*) Poth. ib.
(*xx*) Dig. lib. 45, tit. 2, l. 18, 19. Burgund. ib. c. 56.
(*y*) Art. 1205.

When one of the debtors in *solido* becomes the only heir of the creditor, the debt is not thereby extinguished against the others: for the confusion, or union of characters; "magis personam debitoris eximit ab obligatione, quam extinguit obligationem." But this heir cannot demand the debt from the other debtors, without deducting the proportion for which he is liable in respect to them: and if any of them is insolvent, he ought besides to bear his proportion of the share of the insolvent. It is the same in the opposite case, where the creditor becomes the only heir of one of the debtors (*y*).

The Code Civil adopts these principles: "Lorsque l'un des débiteurs devient héritier unique au créancier, ou lorsque le créancier devient l'unique héritier de l'un des débiteurs, la confusion n'éteint la créance solidaire que pour la part et portion du débiteur ou du créancier" (*z*).

The interruption of the course of prescription against one of the debtors is an interruption of it against all the others (*a*). This also is a consequence of the principle that each of the debtors being a debtor for the whole, the creditor by instituting this proceeding, has instituted it for the whole of the debt, even as against the other creditors.

The Code Civil lays down the same rule. "Les poursuites faites contre l'un des débiteurs solidaires interrompent la prescription à l'égard de tous" (*b*).

By the law of Scotland and England the interruption of prescription against one of the co-debtors would operate as an interruption as to the others.

(*y*) Voet, lib. 45, tit. 2, n. 5. Burgund. ib. c. 58. Poth. ib.
(*z*) Art. 1209.
(*a*) Cod. lib. 8, tit. 40, l. 5.
(*b*) Art. 1206.

SECTION II.

THE LAW BY WHICH IT IS DETERMINED WHETHER THE CREDITORS OR DEBTORS ARE BOUND IN SOLIDO.

The question whether the obligees or the obligors are bound in *solido* is subject to be determined by the law which governs the decision on the constitution and validity of the contract of suretyship, on the rights and obligations derived under it, and the manner in which the obligation is extinguished. The reader is referred to this preceding Chapter, in which these questions have been considered (*a*).

(*a*) Voet de Stat. l. 9, c. 2, n. 10. Burgund. Tr. 4, n. 78. Boullenois, tom. 2, p. 469, 475. Story's Com. § 263, 272, 322, in Fœlix. Tr. du Droit Intern. c. 2, § 2. Massé Droit Commer. tom. 2, liv. 2, tit. 2, l. 1, § 2, p. 188. Fremery, Etudes de Droit. Comm. p. 22, *supra*, p. 74, 295.

BOOK VII.

THE bankruptcy of the principal or surety so materially affects the rights and liabilities of the parties to the contract of suretyship, and the relief which the creditor and surety may obtain, that it becomes necessary to shew the extent to which the demand of the creditors or the surety standing in his place by paying him, will be admitted to proof and participate in the proceeds of the bankrupt's estate. The demand of the creditor against the principal may not be provable under the fiat against the principal. The surety by paying it will not therefore in respect of such payment have a debt which can be proved by him under the fiat. He will only be able to resort to the bankrupt and to any estate he may acquire after he has obtained his certificate.

The nature of the surety's obligation to the creditor may be such as not to constitute a debt which can be proved by the creditor against the estate of the surety in case the latter becomes bankrupt.

It is proposed therefore to consider,

1st. The rights of the creditor against the principal who has become bankrupt, and herein the debts which are provable against his estate, and the set-off and mutual credits which are admitted in bankruptcy.

2ndly. The rights of the creditor against the surety who has become bankrupt.

3rdly. The rights of the surety against the principal, or co-surety, if they are bankrupts.

4thly. The rights of the creditor and surety when the principal debtors being bankrupts were partners or debtors in *solido*.

CHAPTER I.

RIGHTS OF THE CREDITOR AGAINST THE PRINCIPAL BEING BANKRUPT.

SECTION I.

DEBTS PROVABLE.

I. Early state of the Bankrupt Law in excluding debts, future, conditional, or contingent.—No such exclusion under the Civil Law, or the jurisprudence of States in Europe or Holland.—Its injustice corrected by subsequent legislative enactments, 7 Geo. 1, c. 1; 49 Geo. 3, c. 121; 19 Geo. 2, c. 32, s. 2.—Bottomry Bonds and Policies of Assurance.—Sureties, 49 Geo. 3, c. 121.—Annuity Creditors.—6 Geo. 4, c. 16.—Consolidation of the former acts with.—Extensions.—Cases within or not within.

II. Contingent debts, what are?

III. Provisions in marriage settlements.

IV. Contingent debts not within the statute and not provable.

V. Creditors by annuity.

VI. Costs, in what cases provable.

VII. Unliquidated damages.

VIII. Damages liquidated or capable of being ascertained without the intervention of a jury.

IX. Interest.

X. Creditors by bills of exchange and promissory notes.—Objections which could prevent the holder recovering at law will prevent his proving in bankruptcy.—Bills not indorsed.—Bills not indorsed from omission, although intended to be indorsed.—Bills purchased, pledged, deposited.—Indorsement after bankruptcy.—Cross bills.—Proof by the holder where there is no objection to his right to sue on the bill.—To what amount.—Bills not due.—Holder receiving the bill in payment of goods bought of him by the bankrupt.—Payment received by the holder before and after he has proved.—Interest on bills received.

XI. In what respects the jurisprudence of other States in Europe differs

from that of England on the preceding subjects.—Future and contingent debts would not, according to the principles of the Civil law, and the jurisprudence of those countries which are based on it, be excluded from participating in the proceeds of the debtor's estate.—Law of Holland.—Former law of France.—Code de Commerce of 1807 and 1838.—Law of Scotland.—Code de Commerce of Spain and other States.

It is the object of the bankrupt law of England to seize the property of the bankrupt and apply it to the payment of his "debts." But the term "debt" has its own signification and imports only an obligation to pay a certain sum of money to a creditor at a time then past. This expression therefore would exclude demands which depended on a contingency, or contingent debts, the amount of which was not ascertained, and certain demands which, although due, were not payable at the time of the bankruptcy. Hence demands falling under either of these descriptions were not provable against the estate of the bankrupt, and he was not discharged from them by his certificate.

Thus under the bankrupt law of England, although all the property acquired by the bankrupt up to the date of his certificate as well as that which belonged to him when he became bankrupt (*a*) was taken from him, yet those only could prove against his estate and participate in that property to whom certain sums of money were payable on the day and date of the bankruptcy, and from those sums only was he discharged by a certificate. It seems not very consistent with justice that the relief should not be co-extensive with the seizure, and that as it descends to the latest moment, contracts to pay money which represented actual debts in the legal construction of that term before the distribution of the property seized should not be included in the relief (*b*).

(*a*) Callowell *v.* Clutterbuck, 2 Str. 867. Utterson *v.* Vernon, 3 T. R. 546, 4 T. R. 570.

(*b*) Mr. Com. Fane, Ex parte Marshall, 1 Mon. & Ayr. Rep. 732. Ex

In this state of the law a debt contracted or an obligation incurred for the payment of a certain sum of money to a creditor, but the payment of it postponed until a certain event which must happen, could not be proved unless the event happened or the time arrived before the act of bankruptcy. Thus a bill of exchange, however certain might be its payment, yet if it was not due until after the bankruptcy could not be proved.

This exclusion of future and contingent debts from any participation in the estate of the bankrupt which was peculiar to the jurisprudence of England, operated with hardship on the creditor no less than on the bankrupt. It was regretted by Lord Hardwicke, Lord Mansfield, Lord Thurlow, Lord Kenyon and Lord Eldon. Successive interpositions of the Legislature have however greatly lessened this hardship.

Thus under the 7 Geo. 1, c. 31, those whose contracts were in existence before the bankruptcy and in writing, and under the 49 Geo. 3, c. 121, although not in writing, but whose day of payment was *after the date of the commission* (*c*); under the 19 Geo. 2, c. 32, s. 2, the obligees in bottomry and respondentia bonds, and the insured in marine insurances, where the loss or contingency had not happened until *after* the date of the commission, and under the 49 Geo. 3, c. 121, sureties for bankrupt's debts, who under a contract of suretyship prior to the bankruptcy had paid the creditor after the date of the commission and annuity creditors were admitted to prove.

The enactments in these three statutes have been re-enacted in the 6 Geo. 4, c. 16, with important additions.

The provisions of the 7 Geo. 1, c. 31, and the 49 Geo. 3, c. 121, are re-enacted in the 51st section of the 6 Geo. 4, c. 16, "any person who shall have given credit to the bankrupt

parte E. I. Com. 2 P. Wms. 396. Ex parte Groome, 1 Atk. 181. Hancock *v.* Entwistle, 3 T. R. 435. Callowell *v.* Clutterbuck, 2 Str. 867. Taylor *v.* Mill, Cowp. 525. Ex parte Barber, G. & J. 1.

(*c*) 6 Geo. 4, c. 16, ss. 51, 52.

upon valuable consideration for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive at the rate of five per cent., to be computed from the declaration of a dividend to the time such debt would have become payable according to the terms upon which it was contracted (*d*).

In the construction of this clause of the statute it has been held that where upon a loan to the bankrupt bearing interest, it was agreed that six months' notice should be given before repayment was required, the debt was provable though no notice was given before the bankruptcy (*e*).

A bond payable generally on demand, if interest has been paid upon it, though no demand has actually been made, may be proved under the fiat (*f*). But where a bond was given by the bankrupt, for the payment of the interest on the principal debt by half-yearly payments on Lady Day and Michaelmas, or within twenty days next *after demand*, and for payment of the principal to the executors of the obligee, and no demand had been ever made for the interest, the bond was held not to be forfeited, and the obligee incapable of proving it under the commission (*g*).

With respect to *bail bonds*, it has been determined, that where the defendant gave a bail bond to the sheriff, which was

(*d*) 6 Geo. 4, c. 16, s. 51.

(*e*) Clayton *v.* Gosling, 5 B. & C. 360. Ex parte Elgar, 2 Gl. & J. 1. Ex parte Dowman, ib. 241.

(*f*) Ex parte Spurling, C. B. L. 146.

(*g*) Winter *v.* Mousley, 2 B. & A. 802.

forfeited *before* his bankruptcy by non-appearance, and an action was brought against him afterwards upon the bond, the debt on the bond was barred whether the judgment was signed before, or after the bankrupt obtained the certificate, and was therefore provable under the commission, on the principle, that when the penalty was forfeited the debt became due, though execution could not be taken out for more than the damages (*h*), and that the substance of the action on the bail bond was the same as that on the original debt. But if the bail bond was not forfeited until *after* the bankruptcy of the defendant, the bond has been held, in that case, not provable under the commission, as it was then considered a new and distinct cause of action (*i*).

Where a sheriff seized a defendant's goods, against whom a commission of bankruptcy had subsequently issued, and the goods being claimed by the assignees, the sheriff delivered up the goods to them, taking from them a joint bond of indemnity against all loss he might sustain by quitting possession and returning *nulla bona*. The execution creditor brought an action against the sheriff for a false return, and recovered a verdict for 800*l*., and one of the obligors in the bond became bankrupt before the sheriff had paid the amount of the verdict. It was held that the sheriff could not prove under the bond, having sustained no actual pecuniary loss, until after the issuing of the fiat (*j*).

The provision in the 2nd section of the 19 Geo. 2, c. 22, in favour of the obligee in any bottomry or respondentia bond and the assured in any policy of insurance made upon good and valuable consideration, is re-enacted by the 53rd section of the 6 Geo. 4, c. 16. He is admitted to claim, and after the

(*h*) Bonteflour *v.* Coates, Cowp. 25. Dimsdale *v.* Eames, 2 B. & B. 8. 4 Moore, 350. Coulson *v.* Hammon, 2 B. & C. 626.

(*i*) Cockerill *v.* Owston, 1 Burr. 436.

(*j*) Ex parte Marshall, 3 D. & C. 120.

loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing the commission against such obligor or insurer (*j*); "the person effecting any policy of insurance upon ships or goods with any person, as a subscriber or underwriter, becoming bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person or persons so interested is not, or are not, within the United Realm" (*k*).

II. The demand which the 7 Geo. 1, c. 31, and the 9th section of the 49 Geo. 3, admitted to proof, can scarcely be called contingent debts. There was nothing contingent in these debts; they were legal debts; the time for payment had not arrived before the bankruptcy, but the time of payment was fixed and certain (*l*).

The only contingent debts admitted to proof were those on bottomry bonds, and policies of marine insurance.

A contingent debt seems to be a debt where a time of payment may never arrive, or where the time of payment or amount is uncertain, but not, as it seems, when the event depends on the will of the creditor (*m*).

The 56th section of the 6 Geo. 4, c. 46, authorises the admission to proof of debts which are really contingent. It enacts, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such com-

(*j*) 19 Geo. 2, c. 32, s. 1.

(*k*) 49 Geo. 3, c. 121, s. 16. 6 Geo. 4, c. 16, s. 53.

(*l*) Lord Kenyon's observations on 7 Geo. 1. Staines *v.* Planck, 8 T. R. 386.

(*m*) Clayton *v.* Gosling, 5 B. & C. 360.

mission, the person with whom such debt has been contracted may, if he think fit, apply to the Commissioners to set a value upon such debt; and the Commissioners are required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed. This section is retrospective, both with respect to commissions, which issued, and to contingencies, which happened before the passing of the Act (*n*).

III. The stat. 7 Geo. 1, c. 31, did not reach the covenant of the husband with trustees to leave a sum to his wife, or to pay to trustees for her in case she survived him, or died, leaving children, or subject to any other contingency which was not certain. This defect has also been remedied by the 56th section of the 6 Geo. 4, c. 16; so that if the husband binds himself to pay a sum of money to the trustees, a value may, on the application of the trustees or parties interested, be set by the Commissioners on their contingent interest, such as it may be, and they may prove the amount under the fiat, or they may wait till the contingency happens, if they think that the more advantageous course, and then prove for the whole sum that has become payable.

A bankrupt covenanted by his marriage settlement that his heirs, executors, &c. should, within twelve calendar months after his decease, pay 4,000*l.* to trustees, upon trust, to pay the interest to his intended wife for her life, and after her death then to pay the principal sum to the children of the marriage; and if no children, then to the wife, if she survived

(*n*) Ex parte Grundy, Mont. & M. 293.

her husband; but if not, then to the executors of the husband; it was held that this covenant constituted a debt contracted by the bankrupt, payable on a contingency, and capable of valuation within the meaning of this section; and that the trustees were therefore entitled to prove it under the commission (*o*).

So, where a bankrupt having received 550*l.* with his wife on his marriage, gave a bond to trustees, conditioned for the payment of 1,100*l.*, "on receiving notice from the trustees," it was held that, although no notice was given to the bankrupt before his bankruptcy, yet this was a contingent debt within the provisions of the 56th section (*oo*).

Where the bankrupt, by letters to his intended son-in-law, promised to pay an annuity to his daughter upon her marriage, this was held to be a sufficient agreement to entitle the daughter and her husband to prove for the value of the annuity (*p*).

No debt, however, in consideration of marriage, is provable without some memorandum in writing (*q*).

IV. There still remain demands which are not reached by these legislative enactments, which are, therefore, not provable against a bankrupt's estate, and, consequently not discharged by his certificate.

They may be classed under these heads. Such contingent debts as are not contemplated and provided for by the 56th section of the 6 Geo. 4, c. 16, and not capable of being valued,—demands, the amount of which has not been ascertained until after the fiat,—demands which can not be ascertained without the intervention of a jury, or were not certain nor ascertained until after the fiat had been issued,—demands which could not be considered debts, because before the debtor had incurred an obligation which could be considered a debt,

(*o*) Ex parte Tindal, Mont. 375, 462.
(*oo*) Ex parte Hooper, 3 D. & C. 55.
(*p*) Ex parte Sitger, Mont. 100.
(*q*) Ex parte Barter, Mont. 135.

some act was required to be done by the creditor, and that act had not been done by him before the issuing of the fiat.

There are contingent provisions in marriage settlements which are not provable under the fiat, because they are not capable of being valued. As where the contingency depended upon the wife not living apart from her husband, and, in the event of his death, not marrying again. This was held to be such a contingency as was incapable of valuation, and, therefore not provable under the fiat (*r*).

A covenant to secure an annuity on a property to which the bankrupt might become entitled on the death of A. B., is not a contingent debt which is the subject of valuation (*s*).

There are other cases, where a contingent provision in a marriage settlement cannot be proved under a fiat; as, where the provision in the settlement is made of the *husband's property* (*t*), and is expressly contrived for the purpose of avoiding the operation of the bankrupt laws. Thus, a bond given by a trader upon his marriage, to trustees, to be forfeited upon the contingency of his *becoming insolvent or a bankrupt*, cannot be proved (*u*). Such a bond would defeat the object of the bankrupt law, and be a fraud against the rest of the creditors. So a settlement by the husband (although not in trade at the time or intending then to trade) of freehold and leasehold estates, to the use of himself for life, unless he should embark in trade, and in the life of his wife become bankrupt, and from his decease or bankruptcy, then to secure an annuity to his wife, was, upon his afterwards engaging in trade and becoming bankrupt, held void as against his creditors (*v*).

(*r*) Ex parte Davis, Mont. 121, 298.

(*s*) Lyde *v.* Mylne, 1 M. & R. 163.

(*t*) Ex parte Hill, C. B. C. 228. Ex parte Mathews, ib. Ex parte Bennet, ib. 229. Ex parte Cooke, 8 Vez. 353.

(*u*) Higginbotham *v.* Holme, 19 Vez. 88. Ex parte Brenchley, 2 Gl. & J. 174.

(*v*) Ibid.

The fortune of the wife which she brings on her marriage, or a proportionable part of the husband's property, may be settled upon the husband until his bankruptcy, and then to her separate use, or to the use of the children of the marriage, if the husband has received any part of the wife's fortune of the marriage, the amount of what the husband has actually received of her fortune, but that amount only, may be proved as a debt against his estate (*w*).

But whether the sum permitted to be proved is the original property either of the husband or of the wife under the settlement, the husband is entitled to the interest, and the Court will order the dividends on the sums proved to accumulate as a fund, and the assignees will be permitted to receive the interest of that fund, if the bankrupt is entitled to a life interest in the property, the fund itself being kept together, to await any future contingency declared by the marriage settlement. When that contingency takes place, it will then either be applied to the purposes of the trust, or be distributed amongst the creditors of the bankrupt, as the circumstances of the case may be (*x*).

Generally, a liability incapable of valuation at the time of the bankruptcy is not provable, as where the contingency is, whether the original debtor would not himself pay, and whether the bankrupt would ever be called upon to pay (*y*). A bond

(*w*) Ex parte Brenchley, 2 Gl. & J. 174. Lockyer *v.* Savage, 2 St. 947. Ex parte Brown, C. B. L. 215. Stretton *v.* Hale, 2 Bro. 490. Ex parte Henton, 14 Vez. 598. Ex parte Cooke, 8 Vez. 353. Higginson *v.* Kelly, 1 Ball & B. 252. Ex parte Shute, 1 Mont. & B. 385; 3 D. & C. 1. Ex parte Wright, 2 Dea. 551. Ex parte Young, Buck. 179, 3 Mad. Rep. 124. Lester *v.* Gurland, 1 Mont. 471. In re Meaghan, 1 Sch. & Lef. 179. Ex parte Taafe, 1 Gl. & J. 118.

(*x*) Holland *v.* Calliford, 2 Vern. 662. Ex parte Groom, 1 Atk. 107. Ex parte Smith, Co. Bnk. 212. Ex parte Milford, 1 Bro. C. C. 398. Stratton *v.* Hall, 2 Bro. C. C. 489. Ex parte Turpin, 1 D. & C. 120. Mont. 443. Ex parte Saunders, 3 D. & C. 568. Ex parte King, 1 Deac. 143.

(*y*) Clements *v.* Langley, 5 B. & Ad. 372.

for the payment of a certain sum in the event of the wife releasing her dower, but no release was given, was held not provable (*z*). A demand for goods sold to be delivered at a future day which is after the fiat, is not provable (*a*).

A. agreed to sell to B. for 4,000*l.* a ship employed on a distant voyage, when she should arrive at her port of discharge in the United Kingdom, and B. agreed, within one month after her arrival, or within such further time as should be necessary for effecting the repairs and discharging the cargo, on the execution of a bill of sale of the vessel, to deliver to A. two promissory notes for the amount of the purchase money, in default of which A. might sell the ship, and keep the proceeds in part of the purchase money, B. undertaking to pay to A. any deficiency within one calendar month after such sale; and in case the vessel should be lost, the agreement was to be void. On the 27th of March, the ship arrived, before which time B. became bankrupt, and on the 31st of March, A. gave notice of her arrival to the assignees, who declined to complete the contract, and A. sold the ship for 2,833*l.*: it was held, that this agreement amounted to a contract on the part of B. to pay a certain sum on a contingency, liable to be reduced on another contingency; and that A. could prove for the balance of the 4,000*l.*; after deducting the amount of the proceeds of the sale of the ship (*b*).

V. Before the statute of 49 Geo. 3, c. 121, s. 7, a creditor by an annuity, if that annuity were secured by a bond with a penalty, and there were arrears of annuity due at the time of the bankruptcy, and consequently the bond was forfeited, the penalty was considered a debt, not indeed to be received by the annuitant, but to be a security for the growing annuity. At first, the annuity, if there was a sufficient estate, was paid half-yearly.

(*z*) Green *v.* Bicknell, 8 Ad. & Ell. 701.
(*a*) Boorman *v.* Nash, 9 B. & C. 145.
(*b*) Ex parte Harrison, 3 M., D. & D. 350.

This however was subsequently altered, and a value was set on the annuity, and the annuitant came in as a creditor for that value under the commission. If however, there was a bond, and the payment of the annuity was by covenant, the arrears due at the time of the bankruptcy could only be proved.

The 49 Geo. 3, c. 121, was the first legislative enactment which authorised direct proof of annuities *eo nomine*. It enacts, that any annuity creditor of any bankrupt, by whatever assurance the sum be secured, and whether there were or were not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain. This section is re-enacted by the 54th section of the 6 Geo. 4, c. 16, which by the concluding part also establishes the principle on which the value was to be ascertained (*c*), "Regard is to be had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof, to the date of the commission." A farther important addition was made to this provision, in favour of the surety for the annuity and of the bankruptcy grantor. The surety cannot be proceeded against until the creditor has proved against the estate of the bankrupt creditor, and the certificate discharges the bankrupt.

Under this section of the act a contingent annuity granted by the bankrupt to C. D., in case she survived A. B., may be proved before the contingency happens (*d*). So an annuity granted for a certain period, though charged upon certain annual proceeds, as it is capable of valuation, may also be proved under a fiat against the grantor (*e*).

A father, upon a daughter's marriage, wrote to the intended

(*c*) 49 Geo. 3, c. 121, s. 1. 6 Geo. 4, c. 16, s. 54.
(*d*) Ex parte Van Heythusen, 1 Dea. 360.
(*e*) Ex parte, Parratt, 1 Dea. 696.

husband of his daughter's marriage the following, *viz.*: "I promise you, until it is convenient for me to do something better for you, to allow to my daughter 100*l.* a year, which you can have as you may require." This was held to be an annuity for the joint lives of the father and daughter, and provable under a fiat against the father (*f*).

A bankrupt, previous to his marriage, gave a bond to trustees in the penal sum of 3000*l.*, conditioned for the payment to them by his executors of an annuity of 150*l.* in case his intended wife should survive him, in trust for her use and benefit. The bankrupt and his wife were both living: it was held that proof might be made by the trustees for the value of the annuity under this section of the statute, although it was not an annuity in possession (*g*).

Annual interest, stipulated to be paid for the forbearance of a sum of money, cannot be proved as an annuity, for it is not an annuity in any reasonable sense of the term; neither does it come within the meaning of the statute. An annuity implies that the principal sum is gone for ever, and is to be satisfied by yearly periodical payments (*h*).

The annuity is not considered merged in a judgment entered up by A. the creditor against the grantors under a warrant of attorney given by them, and C., who had joined the grantors as surety, and also in giving to A. the warrant of attorney, the same being a collateral security, and the grantors and C. jointly, and any two of them separately, covenanted that the three, or some or one of them, should well and truly pay the annuity. The grantors afterwards became bankrupts, it was held that A. might prove against the estate of the grantors for the value of the annuity, and that the annuity was not merged in the judgment (*i*).

(*f*) Ex parte Annandale, 4 D. & C. 511.
(*g*) Ex parte Broadley, 2 M., D. & D. 524.
(*h*) Winter *v.* Mouseley, 2 B. & A. 806, 807.
(*i*) Ex parte Pennell, 2 M., D. & D. 273.

It is optional with annuity as well as with other creditors to prove under the fiat or not. They may decline to prove and sue the bankrupt if they choose, but to entitle them to sue any surety for the annuity they must prove against the grantor's estate, nor can they now proceed against the bankrupt, as they could formerly under a deed of covenant for securing the annuity, after he has obtained his certificate, for under the 55th section of the 6 Geo. 4, c. 16, the certificate is a discharge from all claims, either of the annuitant or the surety, in respect of the annuity.

VI. Another species of demand was that for the costs of a judgment. Before the 58th section of the 6 Geo. 4, c. 16, unless they were taxed before the bankruptcy they were not provable, but that section has provided that if any plaintiff, in any action at law or suit in equity, or a petitioner in bankruptcy or lunacy, who shall have obtained any judgment, decree, or order against any person who shall *thereafter* become bankrupt, for any debt or demand in respect of which such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner may also prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.

But costs incurred *after* the bankruptcy are not provable under the fiat, though in actions of *contract* they are in general discharged by the certificate, by reason that they follow the original debt. So that if a creditor bring an action against a bankrupt after a fiat has issued, he takes the chance of losing his costs, in case the debt should be barred by the certificate (*j*).

Where the verdict is not obtained until *after the act of bankruptcy*, the costs can in no case be proved, whether the action is on a contract or in tort, unless, indeed, the verdict

(*j*) Graham v. Burton, 14 East's Rep. 202, note.

can be said to be a *dealing* or *transaction* with the bankrupt within the meaning of the 2 & 3 Vict. c. 29 (*k*).

But if the action be on a contract, and there is a verdict before the issuing of the fiat, then, although the judgment should not be obtained until after the issuing of the fiat, the costs are provable, for they are consolidated with the original debt by the verdict, although not ascertained until the judgment (*l*).

If a verdict in an action *ex contractu* is subject to a reference, and it is ordered that the costs of the action shall abide the event of the award, although the award should not be made in favour of the plaintiff until after the bankruptcy of the defendant, the costs are provable under a fiat against the defendant (*m*).

If the *verdict is obtained in an action of tort before the bankruptcy*, and judgment is obtained *before the issuing of the fiat*, although not till after the act of bankruptcy, the costs in such action may be proved as a debt contracted before the fiat, provided the creditor, when judgment was obtained, had no notice of the act of bankruptcy (*n*).

But if the action is in *tort*, and the judgment is not obtained until after the issuing of the fiat, then, as there is no debt whatever with which the costs can be incorporated until the judgment, the costs in this case cannot be proved (*n*).

Where a judgment on a nonsuit was entered up *before the commission* issued against the plaintiff, though not until *after* the act of bankruptcy, the costs were held to be provable, as being a *debt contracted* before the issuing of the commission (*o*).

(*k*) Walker *v.* Burnes, 5 Taunt. 778. D. L. B. 299.

(*l*) Longford *v.* Ellis, 1 H. Bl. 29. Ex parte Hill, 11 Vez. 646. Ex parte Poucher, 1 Gl. & J. 385.

(*m*) Ex parte Helm, Mont. & M. 70.

(*n*) Walker *v.* Barnes, 5 Taunt. 557. Ex parte Hill, 11 Vez. 646. Longford *v.* Ellis, 1 H. Bl. 29. Ex parte Poucher, 1 G. & J. 285.

(*o*) Robinson *v.* Vale, 2 B. & C. 762. Holding *v.* Impey, 1 Bing. 189.

All damages in actions of tort, are contingent and uncertain, but when the judgment in an action of tort was obtained *before the issuing of a commission*, provided the creditor has then no notice of the act of bankruptcy, the damages are provable, as constituting a debt contracted *bonâ fide* within the meaning of the 47th section of the 4 Geo. 4, c. 16. And although the judgment was not actually signed until three days *after* the commission issued, yet as a judgment relates back to the first day of the term in which it is signed, which in this case was before the issuing of the commission, the damages and costs were provable (*p*).

A Judge's order for the payment of the debt and costs is equal to a verdict, and although judgment is not signed nor the costs taxed until after the fiat issues, the plaintiff can prove for both debt and costs (*q*).

Costs ordered by a decree or order in the Court of Chancery unless they were taxed before the bankruptcy could not formerly have been proved. The 58th section of the 6 Geo. 4, c. 16, s. 58, admits them to be proved, as well as costs ordered in any proceedings in lunacy or bankruptcy, although they were not taxed until after the bankruptcy (*r*).

VII. The damages are contingent, unliquidated, uncertain and not provable in all those actions of tort, which do not admit of being waived by the plaintiff and made the subject of an action *ex contractu*, as actions for *torts* to the person or character in which a jury have to determine, not only the amount of the damages to which the plaintiff is entitled, but whether he is entitled to any damages.

Neither are the damages recoverable by an action for mesne profits provable, if the rent does not constitute the only measure for the amount of damages (*s*). But there are many

(*p*) Ib. Ex parte Birch, 4 B. & C. 880.
(*q*) Ex parte Ferris, 2 M., D. & D. 746.
(*r*) Ex parte Sneaps, C. B. L. 193.
(*s*) Goodtitle *v.* North, Douglas, 584.

cases in which the plaintiff might waive the *tort* and bring his action for money had and received, or on a contract to pay a sum certain. In all those cases the damages recoverable in such action will be provable under the fiat (*t*).

VIII. With respect to claims founded upon *contract*, such as a demand either for goods sold, or for work and labour, where there is no agreement as to the price, and which would be recoverable at law in an action on a *quantum meruit*, the demand, though sounding in damages, can be proved, because it can be easily ascertained, and the creditor can have no difficulty in swearing to the amount. So where a bond is given to replace stock *on a certain day*, and the bond is forfeited before the bankruptcy, the damages for not replacing the stock can be proved, because they can be easily estimated, the amount provable in this case, being the value of the stock at the date of the fiat, together with the amount of the dividends receivable before the bankruptcy (*u*).

Where Navy bills were deposited with a firm who gave an accountable receipt for them, and one of the firm became bankrupt, the owner of the bills was held entitled to prove for the value of them on the day of the deposit (*v*). Where teas were sold to be paid for at appointed days, and were left as a pledge for full payment with the vendor, who, in case of non-payment, was to be at liberty to re-sell, and charge the loss to the original purchaser, who became bankrupt, not having paid the purchase money at the appointed time, and the vendor sold the teas at a loss, it was held that he could prove for the residue of the original purchase money (*w*). Not only, indeed, may the creditor prove his demand against the bankrupt in any of these cases, but he is now, in fact, compelled to do so, with a

(*t*) Parker *v.* Norton, 6 T. R. 695.
(*u*) Ex parte Leitch, C. B. L. 149.
(*v*) Bromley *v.* Child, 1 Atk. 258.
(*w*) Ex parte Moffatt, 1 M, D. & D. 282; 2 M., D. & D. 170.

view to his own security; for all demands arising from any breach of *contract* which can with any certainty be liquidated are discharged, if the bankrupt obtains his certificate (*x*).

But unliquidated damages, though arising on a contract, cannot be proved, if there is any *uncertainty* in the mode of estimating them.

Thus, damages sustained from a breach of covenant, in not building a certain number of houses within a given time (*y*), or for not accepting goods contracted for by the bankrupt, and agreed to be delivered at a certain price, and at a certain time, occurring after the bankruptcy (*z*), in not having full power and authority to sell a ship (*a*), or in not indemnifying the assignor of a lease from the covenants contained in it, have been, in each of these cases, held not provable under a commission (*aa*). So, where, upon a loan of Cuba bonds by a customer to his bankers, the latter engaged to replace them within three months, and after the expiration of that period the customer consented to an exchange of other securities for those previously deposited, without any new stipulation as to the period of redemption, and the bankers became bankrupt; it was held, that the time for replacing the bonds becoming indefinite, the bankers were not bound to replace them until requested to do so; and that no such request having been made before the bankruptcy, the customers had no right to prove for the amount of the bonds under the fiat; and that the 6 Geo. 4, c. 16, s. 56, as to the proof of contingent debts, did not apply (*b*). In all the above cases, various circumstances must be taken into consideration, which would either increase or mitigate, or even

(*x*) Forster *v.* Surtees, 12 East, 605.

(*y*) Bannister *v.* Scott, 6 T. R. 489.

(*z*) Boorman *v.* Nash, 9 B. & C. 145. Green *v.* Bicknell, 3 Nev. & P. 634; 8 Ad. & E. 701.

(*a*) Hammond *v.* Toulmin, 7 T. R. 612.

(*aa*) Mayor *v.* Steward, 4 Burr. 3439.

(*b*) Ex parte Eyre, 3 M., D. & D. 12.

sometimes altogether excuse the award of damages, and which it is the peculiar province of a jury to determine. Where there is even a penalty or specific sum of money made payable in a bond of indemnity or covenant, to secure performance, as in a covenant in a lease not to plough up an ancient meadow, or a penalty, which is even specified to be a liquidated penalty, for not supplying a creditor with so many pieces of cloth per week (*c*), the penalty, it has been held, cannot be proved as a debt, as it is not the measure, but only limits the extent of the damages to be claimed in case of a breach (*cc*). But contracts to deliver stock on a certain day are an exception to this rule (*d*).

IX. Interest, unless it arises from contract, either express or to be implied from the nature of the agreement, or the course of dealing between the parties, or the usage of trade, is not admitted to proof, for without such contract it can only be considered in the nature of unliquidated damages, and as such, not provable under the fiat (*e*). Interest on bills of exchange, and promissory notes, is now, under the statute 6 Geo. 4, c. 16, s. 57, provable down to the date of the fiat, although not reserved in the body of those instruments.

The interest provable on a bond can not be proved to a greater amount than will, with the principal, be no greater than the penalty contained in the security (*f*).

Interest is not chargeable against a mere depositary, unless he has made interest of the property deposited (*g*).

(*c*) Ex parte Maclean, 2 M., D. & D. 564.

(*cc*) 3 Wils. 270. Taylor *v.* Young, 3 B. & A. 521.

(*d*) Green *v.* Bicknell, 3 Nev. & P. 634; 8 Ad. & E. 701.

(*e*) Ex parte Champion, 3 Bro. 436. Ex parte Hankey, ib. 504. Ex parte Mills, 2 Ves. 295. Ex parte Boyd, 1 G. & J. 285.

(*f*) Bromley *v.* Goodere, 1 Atk. 80. Ex parte Mills, 2 Ves. 301. Tew *v.* Earl of Winterton, 3 Bro. 489. Knight *v.* Maclean, ib. 496.

(*g*) Bromley *v.* Child, 1 Atk. 259.

Interest upon interest, or compound interest, is not allowed, except in those particular cases where there are regular accounts settled from time to time, and interest on both sides is debited and credited (*h*).

But the creditor is not allowed to prove for interest calculated to a period lower than the date of the fiat (*i*).

Nor can interest beyond that period be indirectly thrown upon the estate, except in the event of a surplus (*j*).

In cases of mutual credit between the creditor and bankrupt, the interest should be stopped at the same time on both sides of the account. Upon a sale of goods to the bankrupt, with an agreement that for prompt payment there should be a deduction of 33*l.* per cent. from the price charged, the creditor will not be entitled to prove for the full price, without deducting the 33*l.* per cent. The Lord Chancellor dismissed a petition seeking to prove for the whole price charged, observing, that the creditor could not make the debt more than the real price of the goods (*k*).

X. It may be the express object of a contract of suretyship that the surety should undertake for the payment by the acceptor of a bill of exchange or promissory note, of which a third party has or may become the holder. The drawer, acceptor, or indorser of a bill of exchange, without having received any valuable consideration, becomes substantially, and in effect, a surety by thus lending his name, and is, there-

(*h*) Ex parte Morris, 1 Ves. 132. Bromley *v.* Goodere, *supra*. Waring *v.* Cunliffe, 1 Ves. 99. Ex parte Bevan, 9 Vez. Ferguson *v.* Ffyfe, 8 Clark & Fin.

(*i*) Bromley *v.* Goodere, *supra*. Ex parte Bennet, 2 Atk. 527; 14 Ves. 573.

(*j*) Ex parte Paton, 1 G. & J. 332. Ex parte Gass, ib. 338 n. Ex parte Wardell, C. B. L. 181. Ex parte Hercey, ib. Ex parte Badger, 4 Ves. 165.

(*k*) Ex parte Ainsworth, C. B. L. 191; 4 Ves. 678. Ex parte Pigon, 3 Madd. 136.

fore, entitled to be indemnified by the party at whose instance he has thus lent it.

The rights which the creditor, as the holder of a bill or note, may, on its being dishonoured, acquire against the estate of the acceptor or maker who has become bankrupt, become a subject of inquiry necessary for the purpose of ascertaining the rights and liabilities of the surety.

Whatever objections the acceptor could make at law or in Equity to the holder's right to recover, they will equally prevail in bankruptcy, and exclude the bill or note from being admitted to proof. Thus the illegality of the consideration if the holder were cognisant of it at the time he took the bill or note, or if the bill or note were void by any express legislative enactment, or from the want of a stamp, or by the operation of the Statute of Limitations in barring any action on the bill or note, or by reason of such a composition with, or giving time to the maker or acceptor as discharges the other parties to the bill or note will prevent the bill or note from being admitted to proof. So also such laches as will discharge any of the other parties would preclude the holder from proving against that party (*kk*).

The bill or note if it be taken by the holder without the indorsement of the party from whom he receives it, cannot be proved, for no debt is provable on a bill or note but what appears upon the face of it (*l*). It is not sufficient that he has put a private mark on the bill which he was accustomed to put on all bills transferred but not indorsed by him, and that he had admitted that he considered himself as responsible for the bills on which he had put this mark as if he had indorsed them (*m*). Neither an engagement in writing to warrant the payment of the bill, in like manner as if he had indorsed it, and which engagement came into the holder's hands for a

(*kk*) D. B. L. 269, 321. Ex parte Dewdney, 15 Vez. 479.

(*l*) Ex parte Roberts, 2 Cox's cases, 171. Fenn *v.* Harrison, 3 T. R. 759. Eyds *v.* Clarke, 1 Esp. 431.

(*m*) Ex parte Shuttleworth, 3 Vez. 368. Ex parte Isbester, 1 Rose, 20.

valuable consideration, will entitle the holder to prove against the party who had thus engaged to pay it. In neither of these cases did the party contract any legal obligation upon the face of the bill (*n*).

By the 1 & 2 Geo. 4, c. 78, s. 2, all inland bills must be accepted *in writing upon the bill*. A. sent B., his agent to America to purchase cotton wool, and gave him authority to draw bills on A., and to sell and discount them, and pay for the cotton with the proceeds. B. drew a bill on A. for 3000*l.* in favour of B., who discounted it for B., and afterwards negociated it to third persons. B. applied the money obtained for the bill in paying for the cotton which he shipped off to Liverpool, consigned to A. Before either the bill had been presented or the cotton had arrived A. became bankrupt. The cotton was sold by the assignees under the bankruptcy. It was held that these circumstances did not constitute any virtual acceptance of the bill by A., and that a subsequent indorsee for value could not prove against A.'s estate (*o*).

The bill is frequently not indorsed, because it is either purchased by or pledged to the party to whom it is delivered. Whether the delivery is a purchase or pledged must depend on the agreement of the parties, or on the circumstances from which an agreement may be inferred. An exchange by two persons of the bill of the same amount has been considered a purchase by each party of the bills of the other. G. accepted a bill for J. and W., and, in exchange, they delivered to him a bill of exchange, accepted by the parties for the same amount, but not indorsed by J. and W. Lord Eldon held that this was a purchase, and although J. had paid his acceptance, and the bill he received was dishonoured, he was not allowed to prove against the bankrupt estate of J. and W. (*oo*).

(*n*) Ex parte Harrison, 2 Bro. 614. Ex parte Bell, 1 Mont. 192. In re Barrington, Sch. & Lef. 112. Ex parte Isbester, 1 Rose, 20.

(*o*) Ex parte Hustler, 1 G. & J. 9.

(*oo*) Ex parte Bolton, 2 Dea. 537.

A person, who taking a bill and discounting it without requiring the indorsement of the party for whom he discounts it, is considered to have purchased the bill, and if such a bill is taken as a purchase, it discharges the debt owing by the person thus transferring it to the full amount of the debt, and consequently the debt cannot be proved against the estate of that person (*p*).

But if it be taken in payment of an antecedent debt without any indorsement, and it is not agreed between the parties that the bill should be taken in payment against all risks, it will be considered as a pledge, and if the bill prove bad, although the bill cannot be proved, yet the debt itself, or so much of it as remains, may be proved (*q*).

If, however, the antecedent debt is paid, the holder cannot then prove against any party to the bill (*r*).

If the bill had been transferred for a valuable consideration and intended, but omitted to be indorsed from forgetfulness, it has been held that the bankrupt may indorse it after his bankruptcy. The act of indorsement is in this case considered a form only, the substance is the transfer for a valuable consideration, and the holder thereby acquires an equitable right to call for the form (*s*).

Although the indorsement of the bill is *primâ facie* evidence of an absolute transfer, yet it may be shewn or be inferred from the circumstances attending the transaction that it was merely a deposit. As if A., owing B. 150*l*., deliver to the

(*p*) Ex parte Whitter, C. B. L. 124. Ex parte Roberts, ibid. Ex parte Smith, ibid. Bank of England *v.* Newman, 1 Lord Raymond, 442; 12 Mod. 241. Com. Rep. 57.

(*q*) Owenson *v.* Morse, 7 T. R. 651. Ex parte Blackburn, 10 Ves. 206. Ex parte Rathbone, Buck. 215, and Richardson *v.* Kirkman, C. B. L. 174.

(*r*) Ex parte Britten, 3 D. & C. 35.

(*s*) Smith *v.* Pickering, Peake, 50. Anon. 1 Camp. 492 n. 2 J. & W. 243, per Sir T. Plummer. Ex parte Price, 3 M., D. & D. 586, and cases there cited.

latter a bill for 300*l.*, B. can only prove for 150*l.* against A., and he will be a trustee for A. as to the surplus which he may receive from the other parties to the bill (*t*).

The delivery by A. of some bills indorsed with others not indorsed by the person to whom he had granted a mortgage, was held, from the circumstance of there being a mortgage, and some of the bills not being indorsed, to be a deposit only (*u*).

The indorsee of a bill, although indorsed to him after the bankruptcy of the acceptor, may prove it under the bankruptcy of the latter, but he can only prove it for that amount for which the indorsee himself could prove at the time of the fiat (*v*). In *Ex parte Isbester* the payment of the bill was made by a person who was in fact never a party to the bill, or liable to pay it.

Bankers' notes, if they have been bought up after the bankruptcy, are not admitted to proof unless it can be shewn that the persons from whom they were bought were entitled to a proof in respect of them (*w*); although in a case where one of the partners of the bank, after obtaining his certificate, took up the notes of the former, he was permitted to prove, upon making an affidavit, that he would not have paid the notes unless there had been a valid claim by the holders against the firm in respect of those notes (*ww*). But whenever a party receives a bill which is negociated *after it is due*, he takes it on the credit of the person transferring it, and subject to all the equities to which it is liable. Before it is due, he receives it on its own intrinsic credit, and he is not bound to inquire into any circumstances

(*t*) Ex parte Baldwin, 19 Ves. 230.

(*u*) Ibid.

(*v*) Ex parte Brymer, C. B. L. 165. Ex parte Thomas, 1 Atk. 73; 2 Wils. 135. Bingley *v.* Maddison, 7 T. R. 499. Ex parte Deey, 2 Cox, 423.

(*w*) Ex parte Rogers Bank, 470. Portsmouth Bank, cit. ib. Ex parte Atkins, ib.

(*ww*) Ex parte Atkins, ib.

existing between the previous parties to the bill and the person from whom he receives it (*x*).

If the creditor and bankrupt have exchanged acceptances, and each party has agreed to pay his own acceptances, the acceptance of the one is considered as given in consideration of the acceptance of the other, and the claim of the one on the other is liquidated by the acceptance taken by him in lieu of his own (*y*). If the acceptances thus exchanged are for the same sum, the presumption is equally strong that such was the understanding of the parties, and the creditor cannot prove against the bankrupt's estate any payment made on the creditor's own acceptance (*z*).

If the acceptance exchanged were not of the same amount, or if there was any variation as to the time of payment of them respectively, it would become a question whether the one party transferred his bills in consideration of those transferred to him by the other party (*a*).

If none of the objections already noticed exclude the bill or note from proof, the holder is entitled to prove the amount of it against all the parties who were liable to be sued by him at law, drawer, acceptor, or indorser, and to receive a dividend on the estate of each, so that he does not receive more than 20*s*. in the pound (*b*).

It is not necessary that the bill should be due in order that it may be admitted to proof, for although it is not due, it is provable under the 51st section of 6 Geo. 4, c. 16. The holder of a bill not due may prove it against the drawer,

(*x*) Brown *v.* Davies, 3 T. R. 80. Bohem *v.* Stirling, 7 T. R. 427. Brown *v.* Turner, ib. 630. Tinson *v.* Francis, 1 Camp. 19.

(*y*) Cowley *v.* Dunlop, 7 T. R. 565.

(*z*) Ibid. Buckler *v.* Buttevant, 3 East. Rep. 72.

(*a*) Ibid.

(*b*) Ex parte King, C. B. L. 156. Ex parte Crossley. Ex parte Downward, ib. 157; 3 Bro. 237. Ex parte Bloxham, 6 Ves. 449, 600; 8 Ves. 55. Ex parte Earle, 5 Ves. 833.

although it is uncertain whether the acceptor will pay it or not when it becomes due. A *debitum in presenti* by the drawer is constituted by the drawing of the bill, in the same manner as it is constituted by the acceptance of the acceptor (*c*).

If the holder has given less than the amount of the bill, he can only prove against the estate of the party from whom he received it the amount actually paid by him, and he can only receive 20*s.* in the pound upon that amount (*d*).

But, as against any other party, he can prove for the full amount of the bill, or without regard to its being an accommodation bill (*d*).

Where A. had furnished goods to B., and the bankrupt had delivered bills with his name upon them to A. for those goods, and such goods were afterwards partly paid for by B., A. could only prove for the sum really due for the goods, and not for the full amount of the bills. But if, without any communication between the bankrupt and A., the bills had been delivered by B. to A., there would had been no immediate contract between the bankrupt and A., and the bankrupt consequently would be answerable for the full amount of the bills, provided A. did not receive dividends beyond the amount of his debt (*e*).

If the purchaser gives a bill for the price of the goods he has bought, and they are afterwards paid for in part, the seller can only prove against the purchaser for the balance remaining due, and not for the whole amount of the bill. The bill, whilst in the hands of the seller, represents only what remains due for the goods (*f*).

(*c*) Starey *v.* Barnes, 7 East, 435. M'Carthy *v.* Barrow, 2 Str. 949.

(*d*) Ex parte King, C. B. L. 156. Ex parte Crossley. Ex parte Durwood, ib. 157; 3 Bro. 237. Ex parte Bloxham, 6 Ves. 449, 600; 8 Ves. 55. Ex parte Earle, 5 Ves. 833.

(*e*) Ex parte Reader, Buck. 381. Ex parte Bonham, 3 D. & C. 285. Ex parte Phillipps, 1 M., D. & D. 232.

(*f*) Ex parte Leers, 6 Ves. 644. Ex parte Todd, 2 Rose, 202, note. Ex parte Moult, 1 D. & C. 44.

If the holder has received part of the amount of the bill before he proves, he can prove only for the amount then due on it (*g*).

But in a case where the circumstances were very special, Lord Eldon permitted the holder of a bill who had received part payment from another party to prove for the whole amount against the acceptor, and to stand as a trustee for such other party in respect of what he received above the actual balance due to himself upon it. In this case A. was the indorsee of B. and C.'s acceptance for 1260*l.*, and had sued out a separate commission against B. having previously received from D., for whom he had discounted the acceptance payments which left only 430*l.* due on them. For as A., who was the petitioning creditor, was the only creditor who could come in with the separate creditors and receive dividends with them, and as D. could not therefore prove so as to receive any dividend, and as the bill would be discharged as against the bankrupt by his certificate, it was just that D. should have what benefit he could from the proof of it (*h*).

But if the holder receives a part from any of the persons liable to pay it, payment *after* he has proved, he is still entitled to a dividend upon the whole amount, provided it does not exceed 20*s.* in the pound in the balance actually due to him (*i*). Bills to the amount of 1,300*l.* were delivered by the drawer to the creditor as a collateral security for a debt of 4,000*l.*, which he owed the latter. The drawer and the acceptor both became bankrupts, but the estate of the acceptor was solvent. It was held that the creditor was entitled to receive 20*s.* in the pound on the bills, from the acceptor's estate, and also under the commission against the drawer prove the debt of 4,000*l.*, and

(*g*) Cooper *v.* Pepys, 1 Atk. 107. Ex parte Prescott, 4 D. & C. 23. Ex parte Leers, 6 Ves. 644. Ex parte Todd, *supra*. Ex parte Moult, *supra*. Ex parte Bank of Scotland, 2 Rose, 197.

(*h*) Ex parte De Tastet, 1 Rose, 10. Ex parte Martin, 2 Rose, 87.

(*i*) Ex parte Wildman, 1 Atk. 109; 2 Ves. 113; 2 B. & P. 62.

receive dividends thereunder on that amount in discharge of the remaining portion of the debt (*j*).

Until the 6 Geo. 4, c. 16, there could be no proof for interest on an overdue bill or note, unless it expressed on the face of it to be payable with interest (*jj*), or unless there was a special agreement or custom of the trade to that effect (*k*).

But by the 57th section of that statute, the holder of a bill overdue at the date of the fiat, though it does not reserve the interest, may prove for interest upon it up to the date of the fiat, at such rate as is allowed by the Court of Queen's Bench on bills and notes.

Where a creditor with whom a bill had been deposited as a security, first proved his debt against the drawer the principal debtor and by other means reduced his debt to 14*l*., he was held entitled to prove under a commission against the acceptor, not only the 14*l*. but also the interest due upon his whole debt up to the time of making that proof for the full satisfaction of the account, in respect of which he held the bill as a security (*l*).

The damages to which foreign bills are subject on being returned protested, and also re-exchange on such bills, are admitted to proof, and also the costs and charges of protesting bills incurred before the issuing of the fiat, and before notice of the bankruptcy (*m*).

This exclusion of future and contingent debts from participating in the proceeds of the estate of the bankrupt was peculiar to the jurisprudence of England.

In the Civil Law the creditors might, subject to arrestment

(*j*) Ex parte Sammon, 1 D. & C. 564.

(*jj*) Ex parte Marler, 1 Atk. 151. Ex parte Cocks, 1 Rose, 317. Ex parte Champion, 3 Bro. 436.

(*k*) Ex parte Hankey, 3 Bro. 504. Ex parte Mills, 2 Ves. 295. Ex parte Williams, 1 Rose, 399.

(*l*) Ex parte Martin, 1 Rose, 87.

(*m*) Francis *v.* Rucker, Amb. 672. Ex parte Hoffman C. B. L. 175.

debts not only pure, but future and contingent. In the distribution of the estate of the debtor amongst his creditors, the debt payable at a future period participated in the proceeds subject to a deduction by way of discount, in respect of the intervening time before it became payable. A creditor whose debt was contingent, obtained security for its payment when the contingency happened (*m*). "Denique, si debitoris obærati bona, curatore dato, actione publica, intervenientibus hastæ solemnibus distracta fuerint, etiam creditori in diem vel sub conditione liberum est suum debitum profiteri, et de protopraxia cum ceteris ejusdem debitoris creditoribus disputare, ut si debitum in diem certum sit illud ipse suo ordine recipiat deducto inde repræsentationis seu præsentis solutionis emolumento, in quantum juxta jura vulgata plus accipit qui statim, quam qui post tempus accipit: sin conditionale sit, ei suum jus prælationis aut concursus cum ceteris creditoribus assignetur, executionem habiturum, cum conditio debiti extiterit, adversus eos, qui ex puro debito sed debiliori jure munito, suum receperunt sub cautione de reddendo, si qui emerserint potiora jura habentes" (*n*).

These principles are followed in Holland, France, Spain, and the other countries where jurisprudence is based on the Civil law. With respect to debts which are not payable, Pothier justly observes that the term was granted to the debtor in the confidence which the creditor had of his solvency and if that foundation fail, the effect of the term ceases. "Le terme accordé par le créancier au débiteur, est censé avoir pour fondement la confiance en sa solvabilité; lors donc que ce fondement vient à manquer l'effet du terme cessé. De là il suit, que lorsque le débiteur a fait faillite, et que le prix de ses biens est distribué

(*m*) Dig. lib. 5, tit. 1, l. 41; lib. 20, tit. 1, l. 14; lib. 5, tit. 3, l. 16. Voet, lib. 2, tit. 4, n. 20; lib. 5, tit. 1, n. 28.

(*n*) Voet, lib. 5, tit. 1, n. 28. Groeneweg. ad Inst. lib. 4, tit. 6, § 28, n. 4. Vinnius ad Inst. lib. 4, tit. 6, § 28. Gomez. Var. Resol. tom. 2, c. 11. Peck. de Jure Sistendi, c. 4, n. 6. Carpz. Def. For. p. 1, Const. 29, def. 30. Van Leewen, Cons. For. p. 2, lib. 1, c. 15, n. 9, 10, 11.

entre les créanciers, le créancier peut toucher, quoique le terme de sa dette ne soit pas expiré" (*o*).

But if several persons are debtors jointly in *solido* and some of these fail, the creditor may demand the debt within the time from them, but not from those who are solvent. The solvent party is entitled to the term and was not obliged to give security (*p*).

With respect to debts payable on a condition or contingency he adds, "C'est encore une différence entre le terme et la condition: car le créancier conditionel, en ces cas, n'a pas droit de toucher, mais seulement d'obliger les autres créanciers, qui toucheront, à s'obliger rapporter à son profit, si par la suit la condition existe" (*q*).

With respect to contingent debts he states, "Quoique le créancier conditionel n'ait encore aucun droit avant l'accomplissement de la condition, néanmoins il est reçu à faire tous les actes conservatoires du droit qu'il espère avoir un jour" (*q*).

In Scotland, the same general principles have always been recognised. Creditors may arrest, or adjudge, in security of debts, though only future, or even contingent. But doubts have been entertained concerning the effect of such diligence, when standing in competition with creditors entitled to *parata executio*. It has, for example, been supposed, that a creditor in a future or contingent debt, arresting a fund of the debtor, is to be postponed in a multiplepoinding to arresting creditors on bills, the term of payment of which is past (*r*).

But it has been observed by Mr. Bell, that the creditor in a debt depending on a contingency which may emerge in the debtor's life, is as truly a creditor as the holder of a bond not yet due: where the debt is certain in its amount, he is a creditor

(*o*) Poth. Tr. des Oblig. p. 2, Art. 3, s. 11, n.
(*p*) Ibid. n. 236.
(*q*) Ibid. n. 222.
(*r*) 1 Bell's Com. p 315.

for a security to that extent: where it is uncertain, he is a creditor for security to the extent of the provable debt: and in either case, he is in law, as well as in justice, entitled to be ranked to the effect of having a contingent dividend set apart (*s*).

By the Sequestration Statutes future and contingent debts are expressly included (*t*). An abatement of interest is made for the time which will elapse before the term of payment arrives.

When the claim of a creditor depends upon a contingency which is unascertained at the date of lodging his claim he is not entitled to vote, nor to draw a dividend in respect of such contingent debt, but he may apply to the sheriff, if the trustee had not been elected, or if elected, to the trustee, to put a value on such debt, and the sheriff or trustee (as the case may be) shall put a value thereon; And on such value being fixed, such creditor shall be entitled to vote and draw dividends in respect of such value and no more. Provided that if such contingency have taken place before the debt has been valued, such creditor may vote and draw dividends in respect of the amount of the debt, but the same shall not disturb any former dividends allotted to other creditors (*u*).

No creditor in respect of any annuity granted by the bankrupt is entitled to vote or draw a dividend until such annuity shall be valued, but he may if the trustee has not been elected, apply to the sheriff, or if elected, to the trustee, to put a value on such annuity, and the sheriff or trustee (as the case may be) shall put a value on the annuity, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value of the annuity as shall have been

(*s*) 1 Bell's Com. p. 315.
(*t*) 54 Geo. 3, c. 137. 1 & 2 Vict. c. 41.
(*u*) 2 & 3 Vict. c. 41.

caused by the lapse of time since the grant thereof to the date of the sequestration, and such creditor shall be entitled to vote and draw dividends in respect of such value and no more(*v*).

In France under the Codes de Commerce of 1807 and 1838, and most of the Commercial Codes of Europe, a distinction is made between those cases in which the insolvent trader has been honest, although unfortunate, and those in which the circumstances to which the insolvency may be attributed, or which accompanied the trader's progress to insolvency afford an inference of gross negligence and extravagant or unjust or fraudulent conduct.

These Codes retain the term bankruptcy for the latter cases and subject the bankrupt to prosecution and punishment as a criminal, in the former they call him *Failli*, and describe the insolvency as *Faillite*.

From the manner in which the insolvent trader is dealt with under these Codes, few of the questions which have been discussed in this Book, could arise.

Thus the proceedings in the insolvency may be closed by a treaty entered into between the insolvent and his creditors in the manner and with the concurrence required, and when it has been ratified its effects will be to restore to the insolvent the administration of that part of his estate which has not been distributed amongst his creditors; he will be subject to be proceeded against if he does not perform the terms of the concordat, and his creditors retain by virtue of the concordat and hypothec on his real estates.

If no such treaty takes place, then an union is formed of the creditors, syndics definitive are appointed who sue for the recovery of the debts owing to the insolvent, the realization of the estate is effected, and when the whole estate which can be made available has been got in and distributed, the union is dissolved,

(*v*) 1 & 2 Vict. c. 41, s. 40.

and the insolvent may on certain terms obtain his reinstatement.

These are some of the articles to which it may be necessary to refer from their connection with the subject of this inquiry. In the Code de Commerce of 1807, all debts due by the insolvent became exigible from the opening of the insolvency, and from the judgment declaring that opening under the Code of 1838.

"L'ouverture de la faillite rend exigible les dettes passives non échues; à l'egard des effets de commerce par lesquels le failli se trouvera être l'un des obligés, les autres obligés ne serons tenus que de donner caution pour le paiement à l'échéance, s'ils n'aiment mieux payer immédiatement" (*w*).

The Code of 1838 has a similar provision,

"Le jugement déclaratif de faillite rend exigible, à l'egard du failli, les dettes passives, non échues.

"En cas de faillite du souscripteur d'un billet à ordre, de l'accepteur d'une lettre de change, ou du tireur à défaut d'acceptation, les autres obligés serons tenus de donner caution pour le paiement à l'échéance, s'ils n'aiment mieux payer immédiatement" (*x*).

A similar provision is the Commercial Code of Spain (*y*), of Portugal (*z*), of Russia, and of Prussia (*a*), of the Two Sicilies, in the Roman States, Ionian Islands, Hayti.

The article 778 of the Code de Commerce of Holland contains a similar provision with respect to debts not due, and when the debt is payable by annual instalments, or if it be payable on a condition, or on a contingency, the debt becomes the subject of valuation, but if such valuation be not practicable

(*w*) Art. 448.

(*x*) Art .444.

(*y*) Art. 1043.

(*z*) Art. 1138 to 1840, and the different Codes in the Concordance of A. St. Joseph.

(*a*) Art. 1043, 1396, *et seq.*

the creditor is permitted to claim for the whole amount, upon giving security to make restitution in case the condition should not be accomplished or the contingency happen (*b*).

SECTION II.

SET-OFF. MUTUAL CREDITS.

I. Statutes of set-off extend to assignees.—Set-off in bankruptcy more comprehensive and effectual.—Consolidation and alteration of the provisions of 5 Geo. 2, c. 30, s. 28, and 46 Geo. 3, c. 135, s. 3, by the 50th sect. of 6 Geo. 4, c. 16.—The alteration.—Mutual credit, what is?—Particular and general liens.—Sums for which one party liable payable at a future day after bankruptcy.—Property deposited or delivered for the purpose of being converted into money.—Goods, &c., delivered upon trust.—What are mutual credits?—Not necessary that the parties intended to trust each other.—There must be strict mutuality.—No set-off between debts or credits in different rights.—No set-off between joint and separate demand—Exception. —Debts due by or to executors and trustees, &c.—When allowed to brokers and factors.—Set-off in respect of bills of exchange.—Distinction whether indorsed before or after the bankruptcy.—Costs.

II. In what respects the Codes de Commerce of the different States of Europe differ from the jurisprudence of England on the preceding subjects.—Reasons for considering debts, &c. not due at the time of the bankruptcy might be set off under the jurisprudence which was founded on the Civil Law.—Opinions of the jurists of Italy.—Decisions in France.—The debt to be set off must have had its origin before the bankruptcy.—Distinction where the debt required to be set off did not arise out of any dealings between the creditor and the bankrupt, but had been acquired by the creditor from a third party.—Law of Scotland.

NOTWITHSTANDING the doubt which formerly existed, it has been long settled that the Statutes of Set-off, 2 Geo. 2, c. 22,

(*b*) Art. 778, 779, 780, 781, 782.

and 8 Geo. 2, c. 24, extended to actions by assignees under a commission of bankruptcy, concurrently with the provisions in the Bankrupt law as to mutual credits (*a*). The Statutes of Set-off have already been considered in a preceding part of this work (*b*). It is intended here to treat of the provisions of the Bankrupt law restricting mutual credits.

Those provisions were the subject of the 5 Geo. 2, c. 30, s. 28, and 46 Geo. 3, c. 135, s. 3. They have been consolidated and altered by the 6 Geo. 4, c. 16, s. 50. By that section it is enacted, "that where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the accounts between them, and one debt or demand may be set off against another, notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit given, or the debt contracted by him, and what shall appear to be due on either side of the balance of the account shall be claimed or paid on either side respectively, and every debt or demand made provable by the statute against the estate of the bankrupt, may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy, committed by the bankrupt.

Under this statute it is not necessary as it was under the 46 Geo. 3, c. 135, that the credit should have been given two months before the date of the fiat. The notice which affects the party is not that the bankrupt was insolvent or had stopped payment, but simply by notice of an act of bankruptcy.

Every debt or demand which may be proved may also be set off against the bankrupt estate. The accounts may now also be

(*a*) Ridout *v.* Brough, Cowp. 133. Lock *v.* Bennet, 2 Atk. 48.
(*b*) *Supra*, p. 188.

taken down to the time of the fiat. If the party had no notice of an act of bankruptcy, he will not now be deprived as he was before the statute of his right to retain a payment made by the bankrupt after an act of bankruptcy for the purpose of taking up bills not due, but which he had himself to pay when due for the accommodation of the bankrupt (*c*).

The 50th section of the 6 Geo. 4, c. 16, like the 28th section of the 5 Geo. 4, c. 30, relates to mutual credits, as well as mutual debts. The set-off thus allowed would extend to many cases in which an action would not be sustained or a Court of Equity decree an account (*d*).

It is not confined to dealings *in trade* or to cases where there are mutual running accounts, but its object is, that in *all cases* of mutual credit the balance only shall be paid (*e*).

The Courts have always given the most liberal construction to the term "*mutual credit,*" and have not confined it to mere pecuniary demands (*f*).

It extends to all those cases in which a party has by contract, usage or custom, a lien for his general balance on property of the bankrupt deposited with him, or in which the credit given by the delivery of the property *must terminate in a debt* (*g*). Thus a debt due by one party, and by that party credit given for a term payable on a future day, and which will then become a debt, or where on the one side a debt is due by one party, and on the other is a delivery of property for the purpose of being converted into money, these are cases in which the money payable and the delivery of the property must terminate in debts.

(*c*) Tamplin *v.* Diggins, 2 Camp. 312. Kinder *v.* Butterworth, 6 B. & C. 42.

(*d*) Ex parte Deeze, 1 Atk. 228. French *v.* Fenn, C. B. L. 536. Atkinson *v.* Elliott, 7 T. R. 378.

(*e*) Lanesborough *v.* Jones, 1 P. Wms. 325.

(*f*) 1 Atk. 228.

(*g*) Rose *v.* Hart, 8 Taunt. 499.

The balance will under the statute be struck on the two debts. But if there had been a deposit of property without any direction to convert it into money, no debt could ever arise out of it, and therefore it cannot be a mutual credit within the statute (*h*). The demand in respect of which a lien of goods in the possession of a party is claimed is always the subject of set-off, but the amount for which it may be set off depends on the nature of the lien. If the party has only a particular lien as a miller or fuller, to whom the corn or cloths are delivered not for the purposes of sale, but merely of being ground and dressed, such delivery is not a credit which *must necessarily terminate in a debt.* They have no right of set-off beyond the sum due to them for their labour in grinding and dressing the specific goods remaining in their possession. If the party has a general lien, as a factor, trader, &c., upon all the goods in his possession for the whole amount which is due to him, he has a right to set off the whole amount of the debt due to him from the bankrupt. Lord C. J. Gibbs, considers when there is a mere deposit of property without any authority to convert it into money, no debt can ever arise out it. And therefore *it is not a credit* within the statute, and that this principle will support all the cases which have been determined on this subject, that is, all those cases in which there was no evidence of a right of lien for the general balance (*i*).

A sum of money payable after the bankruptcy at a future day is included in the term "mutual credit." A. lent his acceptance to the bankrupt. It did not become due until the act of bankruptcy, and was then in the hands of a third party, A. paid the amount of the acceptance after the commission issued and before an action was brought against him by the assignees of the bankrupts for a debt owing by him to the bankrupts. It

(*h*) Rose *v.* Hart, 8 Taunt. 499.
(*i*) Ibid. 499. See Eden's B. L. 179, *et seq.*

was held that he was entitled to set off the amount so paid by him under the term "mutual credit" (*j*).

A. and B. bankers had discounted bills of exchange for the bankrupt, and gave him credit for their value in his account, and whilst they were still running struck a balance which they admitted was in favour of the bankrupt. It was held that the bankers had a right to set off the amount of the dishonoured bills in the action brought against them by the assignees to recover the balance so admitted by them (*k*).

Where the object of a trust between two parties is the sale of goods, and one party is indebted to the other on another account, such trust has been held to be a mutual credit. Thus three persons joined in an adventure for the purchase and the sale of pearls. One of them was to advance the money and sell the pearls, and the other two were with him to share the profit and loss; one of them became bankrupt, the party who was to sell the pearls was held entitled to set off a debt due to him from the bankrupt, in an action brought against him by the assignees against the share of the pearls which belonged to the bankrupt, although the pearls were not sold nor the produce received until after the bankruptcy (*l*).

A parcel of goods was sold by A. to B., and afterwards B. purchased from A. a second parcel, both parcels were sold at six months' credit. When the amount for the first parcel became due B. lodged in the hands of A. a bill of exchange for a larger amount than the value of the goods, for the purpose of paying what remained due on account of the first parcel, and A. promised to return the overplus when the bill was paid. It was the understanding of A. and B. that the deposit was not a general deposit to answer both demands but for the specific

(*j*) Smith *v.* Hodson, 4 T. R. 211. Ex parte Boyle, C. B. L. 542. Ex parte Wagstaff, 13 Ves. 65.

(*k*) Arbonin *v.* Tritton, Holt. N. P. C. 408.

(*l*) French *v.* Fenn, C. B. L. 536.

purpose of securing only what remained due on account of the first parcel. A. received the amount of the bill, B. became bankrupt, not having paid for the second parcel of goods. The assignees of B. brought an action against A. for the surplus of the bill. It was held that A. might retain it in satisfaction of his demand against B. for the second parcel (*m*).

A broker was entrusted by his principals with a policy of insurance to receive an average loss under it, he then became bankrupt. The broker afterwards received the average loss. He was allowed to set off several loans due to him from the bankrupt, for premiums, &c. against the amount received by him upon the policy after the bankruptcy, for the average loss was held to be a debt due before the bankruptcy although not ascertained until afterwards (*n*).

A broker was employed by A., a merchant, to effect policies and sell goods, and was intrusted by him with the possession of the policies and goods, A. was indebted to the broker for premiums and insurances, and obtained an advance of money upon a pledge of goods placed in the broker's hands for sale, but not on those goods to the exclusion of A.'s general credit. A. became bankrupt, afterwards a loss happened on one of the policies and the broker received it from the underwriters. This was decided to be a case of mutual credit, and that the broker might retain the sum received for the loss, not only in liquidation of the balance due for the premiums, but also of his advance. Lord C. J. Gibbs decided this case on the ground that the bankrupt had trusted the broker with the possession of goods and of policies of insurance, and that the broker had trusted the bankrupt with the money advanced, and the premiums paid for them on the policies, and that the general principle was that, wherever each party has trusted the other with the possession

(*m*) Atkinson *v.* Elliott, 7 T. R. 378, but see Key *v.* Flint, 1 Swanst. 30.

(*n*) Whitehead *v.* Vaughan, C. B. L. 566. Parker *v.* Carter, ib.

of value, the assignees of either party in case of bankruptcy can only withdraw that value from the other on the terms of paying what is due between them (*o*).

In all these cases, that which has been held to be a *mutual credit* was of such a nature that it must terminate in a cross debt.

But a contract to indorse a bill of exchange is not a case of mutual credit within the 6 Geo. 4, c. 16, s. 50. It only gives a cause of action for the non-performance of the contract (*p*).

The same doctrine has been applied even to a case of a constructive delivery of the goods to the party dealing with the bankrupt. A. being desirous of making a shipment for his own risk and advantage, but not in his own name, represented to the merchants through whom the shipment was to be made, that the goods were the property of B., and shipped on his account. B., by the desire of A., wrote to the merchants, stating the fact to be so, and desired them to insure and advance money to A. on the goods, which they did. A. at the time was largely indebted to B., and afterwards became bankrupt. It was held that this was a credit given by B. to A., by the delivery of goods which was likely to terminate in a debt, and that B. was not only entitled to recover the proceeds of the shipment from the merchants, but to set off against those proceeds the debt due to him from the bankrupt (*q*).

But where a person is intrusted with property for a special limited purpose, the case is like that of the miller or fuller, and is not that which can be considered a case of mutual credit. A bill of exchange was deposited by the bankrupt with a creditor for the specific purpose of raising money on it, and not as a satisfaction for his debt. The creditor advanced

(*o*) Olive *v.* Smith, 5 Taunt. 56.
(*p*) Rose *v.* Sims, 1 B. & Ad. 521.
(*q*) Easum *v.* Cato, 5 B. & A. 861.

only part of the amount. It was decided that he could not, in an action of trover by the assignees, retain the bill for his present balance previously due to him from the bankrupt, but only for the money actually advanced by him on the bill (*r*).

The same case afterwards came before Lord Eldon, who said it was contrary to natural equity that a creditor who had made advances on the security of a bill of exchange, deposited with him for a special purpose, and who had undertaken to receive the amount when due and return the surplus, should set off advances prior to the transaction against a demand by the assignees for the bill (*s*).

A bill was remitted by the bankrupt to A. for the express purpose of being discounted, and of the proceeds being applied in a particular manner. A., instead of doing so, retained the bill, and received the money when due, which was after the bankruptcy. It was decided that he could not set off a debt due from the bankrupt in an action brought by the assignees for money had and received (*t*).

A mutual credit within the meaning of the statute may be constituted, although the parties did not intend to trust each other in the transaction.

By sending a bill of exchange into the world, credit is given to the acceptor by every person who takes the bill. Thus, if A.'s acceptance gets into B.'s hands, and B. buys goods of A., this would be a mutual credit between A. and B., although A. did not know that the acceptance was in B.'s hands (*u*).

Although the right of set-off is extended beyond that which existed under the statutes of set-off at law, with respect to persons by and against whom it is allowed, yet there must be

(*r*) Key *v.* Flint, 8 Taunt. 21 ; 1 Moore, 451.

(*s*) Ex parte Flint, 1 Swanst. 20.

(*t*) 3 Buchanan *v.* Findley, 9 B. & C. 788.

(*u*) Hankey *v.* Smith, 3 T. R. 508. Sheldon *v.* Rothschild, 8 Taunt. 156.

strict mutuality. The debt, or the mutual credit claimed must be due or given to him in *his own right*, and not in the right of another person. There cannot, therefore, be any set-off between joint and separate debts (*v*), unless, indeed, there was some special agreement between the parties to the contrary. A. had a joint demand against B. and C. B. and C. were the joint creditors of A. B. and C. dissolved their partnership. B., by a letter addressed to A., made himself separately liable to A. on account of the joint demand of A. against himself and C. It was decided by Lord Eldon that B. was not entitled to set off against A.'s demand, although originally a joint demand, the joint debt owing by A. to B. and C., for B., by making himself separately liable to A., did not make the joint debt owing by A. to B. and C. a separate debt to B. (*w*).

But, as has been before stated, the survivor of two or more joint creditors or joint debtors may set off a debt owing by or to him individually.

A Court of Equity will, upon equitable principles in certain cases, allow a set-off between joint and separate debts. Thus A., upon forming a partnership with B., applied to his bankers for a loan to constitute his capital, and they consented upon condition that B. should join in a security for its re-payment. A. and B. accordingly gave their joint and separate bond to the bankers. A joint account was opened by the partnership with the bankers, who also continued to be the private bankers of A. Upon the bankruptcy of the bankers the balance on the joint account, arising from the loan, was against A. and B., and in favour of A. in the private account. Under these circumstances A. and B. were allowed to set off the private balance due to A. against the joint debt due from A. and B. to the bankers,

(*v*) Ex parte Christie, 10 Ves. 105. Ex parte Twogood, 11 Ves. 517.
(*w*) Ex parte Ross, Buck. 125.

for although A. could not at law have pleaded a set-off of this private balance due to him alone, if an action were brought against him and B. jointly on the bond, yet as soon as the bankers had obtained judgment, A. could then have brought his action against them for that balance, and if B., the surety, had paid the joint debt due from A. and B. on the bond, A. would then, of course, have repaid him by the money recovered on that action. The joint debt, therefore, due from A. and B. on the bond was nothing more, as Lord Eldon observed, than a security for the separate debt of A.; and, upon equitable considerations, a creditor who has a joint security for a separate debt cannot resort to that security without allowing what he has received on the separate account in respect of which the joint security was given (*x*).

The statute relates only to mutual credits between bankrupts and other parties. When only some, and not all the partners of a firm are bankrupts, and the assignees and the solvent partner sue for a debt owing to the partnership, there can be no set-off as for a mutual credit. Bills were delivered by A., B. and C. to D. for a special purpose. A. and B. became bankrupts, and their assignees and C., the insolvent partner, brought an action against D. for the proceeds of the bill. It was held that D. could not set off against such claims a debt due to him by A. B. and C. (*y*).

A debt due to a person as executor cannot be set off against a debt due from him in his private character. Even if the executor is residuary legatee, such a set-off will not be allowed, for they are debts in different rights, and there is no mutual credit (*z*). But as a legacy payable by an executor who has

(*x*) Ex parte Hanson, 12 Ves. 346. 18 Ves. 232. 1 Rose, 156. Vuillamy *v.* Noble, 3 Meriv. 648.

(*y*) Stainforth *v.* Fellowes, 1 Marsh. 184. See Thomason *v.* Frere, 10 East, 418.

(*z*) Bishop *v.* Church, 3 Atk. 691. Willes, 109. Bull. N. P. 180.

admitted assets, becomes his own personal debt, it may be set off (*a*). Against a legacy bequeathed to a bankrupt may be set off a debt owing by the bankrupt to the testator (*b*).

Against a demand by a trustee in right of his trust the defendant cannot set off a debt due from the trustee in his own right, but he may set off a debt due from the *cestui que* trust (*c*).

A debt due by a bankrupt to a director or trustee of a public company incorporated by act of Parliament, cannot be set off by them against a demand on them by the assignees for the amount of the bankrupt's stock, the loan not being made on the credit of the stock. The debt was due by the bankrupt to them as private persons. The demand claimed from them was due from them in their corporate capacity (*d*).

But if a director of a public company assign his salary and share to the company, in order to secure a debt which he owes them on his private account, and give authority to the company to order the treasurer to retain his salary and dividends, and sell his share for the payment of his debt, although the authority had not been exercised, and the shares should remain in the director's name, yet it was held that although the shares were in the order and disposition of the director who had become bankrupt, and passed to his assignees, yet the company had a right to set off the debt owing by the bankrupt against the dividends and salary due to him at his bankruptcy (*e*).

By an express bye-law of a company, the stock of each member was subject to be distrained for such debts as he

(*a*) Jeffs *v.* Wood, 2 P. Wms. 128.

(*b*) Ibid. Burridge *v.* Row, 1 Y. & C., 190. Ex parte Makins, 2 M., D. & D. 509. Deac. B. L. 763.

(*c*) Fair *v.* M'Ivor, 16 East, 130. Forster *v.* Wilson, 12 M. & W. 191. Eland *v.* Karr, 1 East, 375.

(*d*) Meglioruchi *v.* Royal Exchange Assurance Company, 1 Eq. Ca. Ab. 9.

(*e*) Nelson *v.* London Assurance Company, 2 Sim. & S. 292.

should owe the company. The bankrupt was indebted to the company for a balance in his hands, as their banker or cashier. It was held that the company might set off his debt against the stock and dividends belonging to the bankrupt (*d*).

A debt due by the bankrupt to the wife *dum sola* cannot be set off against a debt due by the husband, nor can a debt due from the wife *dum sola* be set off in an action brought by the husband alone, unless he had made the debt his own by promising to pay it after the marriage (*e*).

But if a legacy had been given to the wife, and she had died before asserting any claim, so that it belonged absolutely to the husband surviving her, and as the executor might have set off against it any debt owing to him by the bankrupt, the assignees, on the bankruptcy of the husband, could only take the legacy subject to that right (*f*).

Even where the wife was living, and the husband's right to the legacy was subject to her equity to a provision, the executors were allowed to set off a debt due to the testator by the bankrupt against a moiety of the legacy given to his wife, the other moiety being ordered to be settled on the wife for life, with remainder to the issue of the marriage (*g*).

If a broker or factor, acting under a *del credere* commission, effect a policy in his own name, he has a right to set off the money due for losses or returns of premium against the claim of the assignees of the underwriter. As he subjects himself to all the liabilities, so is he invested with the rights of the principal (*h*). But if he has no such commission, or, if having

(*d*) Gibson *v.* Hudson's Bay Company, 1 Str. 645.

(*e*) Ex parte Blagden, 2 Rose, 249; 19 Ves. 465. Paynton *v.* Walker, B. N. P. 179.

(*f*) Ranking *v.* Barnard, 5 Mad. 32.

(*g*) Ex parte O'Farrall, 1 G. & J. 64, but see Carr *v.* Taylor, 10 Ves. 578.

(*h*) Grove *v.* Dubois, 1 T. R. 112. Bize *v.* Dickason, ibid. 287.

such commission, he discloses the name of the principal, he will not be entitled to this right of set-off (*i*).

The lien of a broker may give him the same right of set-off as if he were acting under a *del credere* commission, as when he acquires an interest by an advance to his principal on the credit of a particular consignment. Brokers not acting under a *del credere* commission effected policies on account of their principal, but in their own names, and accepted bills drawn on them on account of goods consigned to them, and which were lost before their arrival. The brokers were held entitled to set off the amount of such loss against the claim of the underwriters' assignees for the premium due in respect of the subscription to the policies on the goods (*j*).

Whenever it is a case of mutual trust and credit, which must terminate in a debt, the right of set-off may be exercised by any other person as well as brokers and factors, in respect of a balance due to him from the bankrupt (*k*).

It was settled by the unanimous decision of the twelve judges, although a different decision had been previously given by the Court of Common Pleas (*l*), that an underwriter may set off against the assignees of the assured the amount of premiums due to him before the bankruptcy against a loss occurring after the bankruptcy. This decision proceeded on the equitable construction of the 19 Geo. 2, c. 32, s. 2, (now the subject of the 53rd sect. of the 6 Geo. 4, c. 16,) for that as under this statute the set-off was to be allowed to the assured in the case of a bankrupt underwriter, so, by parity of reason,

(*i*) Minett *v.* Forrester, 4 Taunt. 541. Goldschmidt *v.* Lyon, 4 Taunt. 534. Shee *v.* Clarkson, 12 East, 507. Koster *v.* Eason, 2 M. & S. 112. Morris *v.* Cleaseby, 1 M. & S. 576; 4 M. & S. 560. Peel *v.* Northcote, 7 Taunt. 478.

(*j*) Parker *v.* Beasely, 2 M. & S. 423, S. P. Davies *v.* Wilkinson, 4 Bing. 578.

(*k*) *Ante*, p. 457, 8.

(*l*) Glennie *v.* Edmunds, 4 Taunt. 775.

it ought to be allowed to the underwriter in case of a bankrupt assured (*m*).

But an underwriter cannot set off a general balance due to himself from the broker at the time of the adjustment of a loss against a claim by the assured, although he had at that time struck the underwriter's name out of the policy and the adjustment, in consideration of the balance owing by him to the underwriter. His right of set-off is confined to what is due to him for the premiums on the particular policy (*n*).

A factor can now, under the 50th sect. of 6 Geo. 4, c. 16, set off payments made by him up to the date of the fiat against his principal, if he had no notice of the act of bankruptcy.

A factor is entitled by the 6 Geo. 4, c. 94, s. 6, to pledge the goods deposited with him by the principal. The person with whom they are so pledged has a right of set-off against the owner of the goods to the amount of the money advanced on the goods, and the real owner redeeming the goods, is entitled in case of the bankruptcy of the factor, to set off the amount paid by him for their redemption against any debt which he may owe to the factor.

The indorsee of a bill of exchange, if it be indorsed *before* the bankruptcy, it has been seen, may set it off against a debt owing from the indorsee to the bankrupt, but if it be indorsed after the bankruptcy (*o*), it cannot be set off; for although, as against the bankrupt, it was a debt subsisting before the bankruptcy, yet it is not a debt due from him to the same party as was debtor to the bankrupt at the time of the bankruptcy; and although it is allowed to be proved, yet the effect of proving it is very different from that of setting it off (*p*). It has been said, that a creditor has no right, by an *ex post facto* transaction, to

(*m*) Graham *v.* Russell, 2 Marsh. 561; 5 M. & S. 498.
(*n*) Todd *v.* Reed, 3 Star. 16.
(*o*) *Ante*, p. 467, 8.
(*p*) Marsh *v.* Chambers, 2 Strange, 1234.

change the situation in which he stood to the bankrupt's estate at the time of the bankruptcy (*q*).

In claiming a set-off as indorsee of the bill, it is incumbent on him to shew that the indorsement was made before the bankruptcy (*r*).

But if the party takes the notes of a banker before he has notice of an act of bankruptcy, although after he knew that the bankers had stopped payment, he is entitled to set them off against the assignees (*s*). A bill returned to a debtor after the bankruptcy may be set off against the assignees (*ss*).

After a mutual credit has once been constituted between the creditor and bankrupt before the bankruptcy, neither the bankrupt nor his assignees can put an end to that credit so as to defeat the right of the creditor to set off any debt due from the bankrupt against the sum claimed from the creditor or acceptor of the bill (*t*).

When there are cross acceptances, the holder of the bankrupt's acceptances will not be entitled to avail himself of them by way of set-off or mutual credit, unless he clearly proves that the obligation of himself to pay the bills subsisted before the bankruptcy, or that, in the origin of the bills, a mutual credit had been created (*u*).

An agent of the bankrupt, who was provided with funds for the purpose, accepted bills drawn by the bankrupt, and the latter paid them away to his creditors. The holder of the bills, after they became due, and before the act of bankruptcy, in order to relieve the acceptor from his liability to them, took

(*q*) Cullen's B. L. 205. Evans *v.* Prosser, 3 T. R. 186.

(*r*) Lucas *v.* March, Barnes, 453. Dickson *v.* Evans, 6 T. R. 57.

(*s*) Hawkins *v.* Whitten, 10 B. & C. 217. Dixon *v.* Cass, 1 B. & Ad 343.

(*ss*) Collins *v.* Jones, 10 B. & C. 784.

(*t*) Bolland *v.* Nash, 8 B. & C. 105.

(*u*) Ouchterlony *v.* Easterby, 4 Taunt. 888.

from him 10*s.* in the pound, and delivered up the bills to the acceptor. It was held, that as the bankrupt's estate was by such composition discharged against any claim of the holders of the bills, the acceptor had a right to set off the full amount of the acceptances against any claim of the assignees. It was considered that the transaction was a payment by the acceptor of the whole amount of the bills, and a gift by the holder to the acceptor of the difference between the sum actually paid and the full amount of the bills (*v*).

Such costs as may be proved under the 58th section of the 6 Geo. 4, c. 16, may, it is conceived, be set off against any demand of the assignees.

As it was permitted the creditor under the civil law and those systems of jurisprudence which are based on it to rank for future and contingent debts on the proceeds of his debtor's estate, and especially under those Codes de Commerce, which make all the debts of the bankrupt exigible from the opening of the bankruptcy, it would seem to follow as a necessary consequence that he could not be collocated for his entire demand, when he himself was a debtor to the bankrupt, although the term for the payment of it had not arrived, or although it was subject to a condition which had not been performed, or a contingency which had not happened. The mass of creditors would be prejudiced if he were permitted to receive a dividend on his entire demand, instead of a dividend on that which would remain due to him after deducting his own debt to the bankrupt. The creditor himself was prejudiced, since he would receive only a part of the debt owing to him when the term arrived, or the condition was performed, whilst he would pay to the bankrupt's estate the whole of the debt which he owed to him. The right of a creditor against whom a judgment had been obtained for a demand which could not, when the action was

(*v*) Stonehouse *v.* Reid. 3 B. & C. 669.

brought, be the subject of compensation, because the term for payment had not elapsed, to oppose to the execution of such judgment the demand which, by reason of the term having elapsed, was then payable, favours this opinion (*w*). The right of retention of property delivered to the party for his demand in respect of work or other services performed on it, would give him all the benefit of compensation, although the term of payment had not arrived (*x*).

It was part of the commercial custom, the law merchant in the Italian States, that persons indebted to the bankrupt might oppose to the demand of the latter, who is represented by his creditors, the debt which was owing to him by the bankrupt, although not then due. The custom is thus stated: "Si quis erit seu remanserit creditor alicujus, vel occasione cambiorum, vel alia quavis, et, è contra, erit seu remanserit debitor ejusdem, et hæc *sive in diem*, sive purè, et tam pro se ipsis respectivè quàm pro aliis, sive pro computo aliorum; et aliquis ipsorum, creditoris aut debitoris, efficiatur non solvendo qui sic debitor et creditor remanserit, præferatur omnibus in compensatione, et retentione pro concurrenti quantitate; teneatur tamen quando esset creditor non solum pro se, sed pro computo alterius seu aliorum, distribuere ad ratam omne id quod compensasset seu retinuisset" (*y*).

It is treated by Scaccia (*z*), and afterwards by Casaregis (*a*) as part of the law merchant. The right of compensation was recognised by an *arrêt* of the Parliament of Flanders, 1st of May, 1775 (*b*), by an *arrêt* of the Court of Turin, du 18 Ventose, an

(*w*) Fab. Cod. lib. 7, tit. 21, def. 12.

(*x*) Voet, lib. 16, tit. 2, n. 20. Gail. lib. 2, Obs. 12, n. 5. Math. de Auct. lib. 2, c. 10 n. 21; lib. 1, c. 19. Resp. Jurisc. Holl. p. 1, Consil. 196. Vanleuw. Cens. For. p. 1, tit. 4, c. 37.

(*y*) Statut. de Genes, liv. 4, c. 14.

(*z*) De Comm. § 2, Gloss. 5, n. 437.

(*a*) Disc. 135.

(*b*) Merlin Rep. Compens. § 2, n. 5.

XIII. (*c*), by an *arrêt* of the Court of Brussells, of the 6th of July, 1808 (*d*), and by an *arrêt* of the Court of Paris, 18th June, 1819 (*e*).

The two latter *arrêts* were annulled by the Court of Cassation, the one on the 12th of February, 1811 (*f*), and the other 17th of February, 1823.

M. Pardessus adopts the decision of the Court of Cassation, but he admits that this right of compensation would exist if the respective debts had been introduced into the *compte courant* between the parties, or if they arose out of the same source or in respect of the same transaction (*g*).

The Court of Bourdeaux has since decided in conformity with this view, that when the respective debts are introduced into the *compte courant* of the creditor and debtor they may be set off against each other, although the term for payment has not elapsed (*h*).

It is to be observed that in these cases in which the *arrêts* of the Courts of Brussells and Paris were given, and subsequently annulled by the Court of Cassation, the debtor of the bankrupt had become his creditor not by any dealings between him and the bankrupt, but by means of the cession to him of some commercial obligation which the bankrupt had contracted with another and which the latter had ceded to the debtor. Thus the respective debts had never been the subject of mutual dealings between the debtor and the bankrupt, the demand which he claimed to set off had never been an item in any *compte courant* between them. There was no ground therefore for presuming that the parties dealt upon the faith of being liable to each other only for the balance upon their mutual dealings. A cessionary debtor, if he could thus set off the

(*c*) Dalloz. Jurisp. Gen. Oblig. c. 5, s. 4, Art. 1, p. 685, note.
(*d*) Merlin, ib.
(*e*) Roger & Garnier's Annal. de Jurisp. Com. t. 1, p. 247.
(*f*) Merlin, ib. Sirey. 12, l. 141. Roger v. Garnier, ib.
(*g*) Pardess. tom. 4, n. 1125.
(*h*) Roger & Garnier, tom. 5, p. 132.

debt, although the term of its payment had not arrived, would be enabled to give to the creditor an advantage in respect of his demand to which he was not entitled, and prejudice the body of creditors.

The Prussian Code admits a debt of which the term of payment has not arrived to be set off against a debt which is then payable with an allowance of discount for the intervening time which would elapse before the former became payable (*i*). But the debt must have originated in dealings which have preceded the bankruptcy in order that they may be set off. A claim as creditor acquired since the bankruptcy can not be set off (*ii*).

The law of Scotland, when one of the parties is bankrupt, allows the other to defend himself against a present demand, by setting off a debt that is future or contingent, although the term of payment be after the bankruptcy. He cannot so plead, however, on a debt arising after bankruptcy (*j*).

Although in compensation the debts must be both liquid or capable of immediate liquidation (*k*), yet this does not hold as to the balancing of accounts in bankruptcy. If one party have failed, and a demand be made on the other, he will not be obliged to pay the liquid debt, and come in as creditor only for a dividend: the immediate necessity for payment of the liquid debt is taken away by the bankruptcy: and there is no impediment to the equity which holds the one debt an extinction of the other (*l*).

The debt and credit between the parties must mutually exist before bankruptcy (*m*).

(*i*) Art. 158, 159. (*ii*) Art. 317 to 319, 320, 327.

(*j*) 2 Bell's Com. 128. Mill *v.* Paul, Nov. 22, 1825, Fac. Coll.; 4 S. & D. 219.

(*k*) 3 Ersk. 4, § 16. Lillie *v.* M'Kessock, Nov. 24, 1818, Fac. Coll. Edwards *v.* Adam, May 24, 1821; 1 Shaw & Dunlop, 27. M'Niel *v.* Falconer, July 2, 1824; 3 Shaw & Dunlop, 204. Monro *v.* Monro, May 14, 1823; 3 Shaw & Dunlop, 300.

(*l*) 3 Ersk. 4, § 16; 2 Bell's Com. 129.

(*m*) Elchie's Compens, No 6, notes, 101. Cauvin *v.* Robertson, June 18, 1783, Fac. Coll. 170; M. 2581.

CHAPTER II.

RIGHTS OF THE CREDITOR AGAINST SURETY—BANKRUPT.

The 52nd sect. of 6 Geo. 4, c. 16, giving relief to sureties as creditors does not extend to sureties being bankrupt.—Right of creditor against surety depends on nature of his engagement.—Whether contingent, so as to be subject to valuation.—*Quære*, whether a guarantee is provable.—Where breach of guarantee would be unliquidated damages.—A guarantee for the payment of all acceptances by creditor for principal.—Instalments of an annuity.—Bail, discharge of surety.—Surety for payment of rent reserved by lease.—Receipt of dividends by creditor.—Effect of on proof against surety.—Creditor by annuity must proceed against the principal.—Law of Scotland.

THE statutes 49 Geo. 3, c. 121, s. 8, and 6 Geo. 4, c. 16, s. 52, which give relief to sureties as creditors do not apply to cases where the surety himself becomes bankrupt (*a*). The right of the creditor to prove against the estate of the surety when the latter becomes bankrupt depends upon the nature of his engagement, as whether it is an absolute, or only a conditional or contingent debt which is provided for by the 56th section of the 6 Geo. 4, c. 16.

If the engagement of the surety is absolute, the creditor's right to prove exists independently of the 56th section of the 6 Geo. 4, c. 16, as where he executes together with the principal a joint and several bond conditioned for the payment of a certain sum by instalments, and the surety is bankrupt after the first instalment has been due, or where the first instalment is not paid by the principal until a month after it became due, and the surety afterwards became bankrupt; in both these cases the bond is provable against the surety's estate (*b*).

(*a*) Ex parte M'Millan, Buck. 287.

(*b*) Brooks *v.* Lloyd, 1 T. R. 17. Penny *v.* Foy, 8 B. & C. 11. Skinners' Company *v.* Jones, 3 Bing. N. C. 481.

But if the principal as well as the surety has become bankrupt and the obligee had proved his whole debt against the principal, and received a dividend, he could only prove against the surety's estate for the residue (*c*).

So where the surety had delivered to the creditor a bill of exchange to secure the payment of goods delivered by the creditor to the principal, which the principal afterwards partly paid the creditor. Proof is admitted not for the amount of the bill, but for the sum remaining due for the goods (*d*).

A. previous to his bankruptcy had become surety to B. and Co. against any loss on account of the non-payment of an instalment by certain joint debtors of B. and Co. One of those joint debtors became bankrupt, and under an order of the Lord Chancellor, B. and Co. were allowed to prove under the commission and received a dividend. It was ordered that the benefit of the future dividends should be sold, and the produce paid to B. and Co., and that the monies so received by them, together with the amount of the former dividends, should be deducted from the instalment, and that B. and Co. should prove for the difference under the commission against A. (*e*).

When the engagement of the surety depends on a contingency, the question is, whether it is that contingency on which the commissioners can set a value under the 56th section of the 6 Geo. 4, c. 16.

It was suggested by the late Lord Henley, that there was no reason why a guarantee for the payment of goods should not be provable against the party guaranteeing the payment, although the credit given to the purchaser had not expired, as well as a guarantee by the bankrupt to repay money lent to a third person on receiving previous notice, although no notice

(*c*) Ex parte Wildman, 1 Atk. 109; 2 Ves. 113. Martin *v.* Brecknell, 2 M. & S. 39.

(*d*) Ex parte Reader, Buck. 381.

(*e*) Ex parte Reid, Buck. 239.

was given previous to the commission. It has been observed in the late Mr. Deacon's excellent work on the Bankrupt Laws, that there are no means by which the Commissioners could set a value on the chance of payment, there being no rates of premium yet calculated for insurances against dishonesty or insolvency. The author observes, that where, however, a guarantee can be considered as an original and absolute undertaking to pay the debt of a third person, at all events, in such a case, the guarantee can hardly be considered as creating any *contingent* liability, and although in form it may be an undertaking that A. B. shall pay, yet it is at most an undertaking to pay by the hand of A. B., and, therefore, such a guarantee would be provable under a fiat against the party guaranteeing (*f*).

A surety had covenanted that A. B. should duly pay a premium upon a policy of assurance effected to secure a debt due from A. B. to a creditor; and the premium was not paid by A. B. or by the surety, who became bankrupt, but was paid by the creditor only three days before the bankrupt obtained his certificate; it was held, that this was no debt from the bankrupt, contingent or otherwise, but was only a mere claim for unliquidated damages (*ff*).

But where A. guaranteed to a banking company "all current obligations in their hands, to which B. might be a party, and also all his future obligations that might come into their hands," it was held, that this part of the guarantee as to future obligations implied a consideration, and that the banking company might, on the bankruptcy of A., prove for the amount of their advances to B., *subsequent* to the date of the guarantee (*g*).

(*f*) D. B. L., 236.

(*ff*) Atwood *v.* Partridge, 4 Bing. 209. Boorman *v.* Nash, 9 B. & C. 145; 3 D. & C. 892. Yallop *v.* Ebers, 1 B. & Ad. 698.

(*g*) Ex parte Littlejohn, 3 M., D. & D. 132.

A guarantee was given by C. to A. in consideration of A. allowing B. to draw upon him, and accepting such drafts for the payment of all such acceptances. C. became bankrupt before the acceptances were due. It was held, that after they became due, and B. had neglected to provide for them, A. was entitled to prove the amount against C.'s estate (*h*).

C. as surety, executed a bond to A. to secure the repayment to him by a certain day of 2,000*l.* which he had advanced to B., and the condition was, that if B. made default in paying on the day named, C. should pay within one week. B. did make default after C. had become bankrupt; it was held that the debt was provable against the estate of C. (*i*).

C. and Co., before their bankruptcy, became sureties to A. for the payment to them by D. of 300*l.* for the erection of a sugar mill, on the production of a certificate by an engineer that the mill was erected according to the terms of a certain specification. A. produced a certificate of the erection of the mill, stating, however, a deviation from the original plan with the consent of D. C. and Co. made no objection to the deviation, but informed A. it was not in their power to pay the money. It was held, that A. might prove the 300*l.* under the fiat against C. and Co. (*j*).

The instalments of an annuity, for the payment of which A. had become surety, and undertook to pay on default by the grantor, and which have not become due until after A. had become bankrupt, are not provable against his estate (*k*).

Before the 6 Geo. 4. c. 16, if the bankruptcy of a party who had become bail for another, took place before he was fixed, or being bail in error, before the judgment had been

(*h*) Ex parte Myers, 2 D. & C. 251. Ex parte Simpson, 3 D. & C. 792.

(*i*) Ex parte Lewis, Mont. & M. 426.

(*j*) Ex parte Ashwell, 3 D. & C. 281.

(*k*) Thompson *v.* Thompson, 2 Bing. N. C. 168.

approved, the debt could not have been proved against him (*l*). But now, if the bail is fixed or the judgment affirmed before the application to prove, the time of the bankruptcy would not affect the right to prove.

A. became surety for the payment to B. by C. of 24,000*l*., by yearly instalments of 1200*l*. B. afterwards agreed to accept six joint notes of A. and C. for 2100*l*. each, and delivered up the original agreement to C. One only of these notes was paid. It was held that B. could not prove the original debt of 24,000*l*., but only the amount of the five notes which remained unpaid (*m*).

When a surety joins the principal in a bond, conditioned for the performance of covenants, in a lease, the surety is still liable, notwithstanding the principal, under the 75th section of the 6 Geo. 4, c. 16, has obtained and is discharged by his certificate from the covenants contained in the lease (*n*).

It has been shewn in a preceding part of this work, that the discharge of the principal operates as a discharge of the surety, but that the discharge of the surety does not operate as a discharge of the principal or of a co-surety (*o*).

The creditor does not, either by issuing a fiat against the principal or by proving against him, discharge the surety (*p*).

If the creditor receive dividends he can recover from the sureties only the difference (*q*). On a bond payable by instalments the surety is liable for the difference between the whole amount of an instalment and the proportional amount of the dividend received in respect of that instalment (*r*).

(*l*) Hochley *v.* Merry, 2 Str. 1043.

(*m*) Ex parte Powell, 1 Deac. 378.

(*n*) Inglis *v.* M'Dougal, 4 Moore, 196. Tuck *v.* Tyson, 6 Bing. 321.

(*o*) *Supra*, b. 2, c. 3, *et seq.*

(*p*) Mont. & Ayr, p. 87.

(*q*) London Assurance Company *v.* Buckle, 4 Moore, 153. Bardwell *v.* Lydal, 5 Moo. & Pay. 334.

(*r*) Martin *v.* Brecknell, 2 Maule & Selw. 39.

It has been seen in a previous chapter of this book, that the 55th section of the 6 Geo. 4, c. 16, enacts that it shall not be lawful for any person entitled to an annuity granted by the bankrupt to sue any person who may be a collateral security for the payment of the annuity until the annuitant shall have proved under the commission for the value of the annuity.

C., as surety, covenanted to pay an annuity granted by A. to B. in case A. made default, and a judgment also was entered up against A. and C. The annuity remained unpaid from January, 1823. A. had left the country; C. became bankrupt in 1824, and afterwards obtained his certificate. It was held that neither the value of the annuity nor the sum due on the judgment was provable under C.'s commission (*s*).

But neither the value nor the instalments of an annuity, for the payment of which a surety expressly covenants in case of the default of the grantor, are provable under a fiat against the surety, where the instalments do not become due until after the bankruptcy of the surety; for the surety does not contract a debt until default made, either under the 54th or 56th clauses of the 6 Geo. 4, c. 16 (*t*).

In Scotland, where a creditor has an obligant bound to him along with the bankrupt, for the whole or part of the debt, such obligant shall not be freed from his liability for such debt in respect of any vote given or dividend drawn by the creditor, or of his assenting to the discharge of the bankrupt, or to any composition, but such obligant may require and obtain, at his own expense, from such creditor an assignation to the debt, on payment of the amount thereof, and in virtue thereof enter a claim on the said estate and note, and draw dividends if otherwise lawfully entitled to do so (*u*).

(*s*) Johnson *v.* Compton, 4 Sim. 37.

(*t*) Thompson *v.* Thompson, 2 Scott, 266; 2 Bing. N. S. 168. Ex parte Marks, 3 Deac. 133. Ex parte Thompson, 2 Dea. & C. 126.

(*u*) 2 & 3 Vict. c. 41, s. 42.

Where a creditor has an obligant bound with, but liable in relief to the bankrupt, or holds any security from an obligant liable in relief to the bankrupt, or any security from which the bankrupt has a right of relief, such creditor shall, before voting, make an oath, in which he shall put a specified value on the obligation of such obligant, and on such security, to the extent to which the bankrupt is entitled to relief, and he shall deduct such value from his debt and specify the balance, and he shall be entitled to vote in respect of such balance and no more, without prejudice to the amount of his debt in other respects (*u*).

Where any person is bound as cautioner for payment of such annuity, it shall not be lawful for the creditor therein to sue or charge after the date of the sequestration such cautioner, and such cautioner shall only be liable for the value fixed as aforesaid and the arrears of annuity, and on such cautioner making payment of such value and arrears to the creditor, and the lawful interest thereon, he shall be discharged of all liability for such annuity, and he may thereupon enter a claim in the sequestration for the sum so paid, and vote and draw dividends thereon. Provided that if such cautioner shall not pay the sum so fixed, and arrears as aforesaid, before any payment of the annuity subsequent to the fixing thereof becomes due, he shall be bound to make payment of the said annuity, and all subsequent annuities, until he shall make payment of the sum so fixed, arrears of annuity, and interest as aforesaid, deducting always such dividends as the creditor shall have received for full payment as aforesaid (*v*).

(*u*) 2 & 3 Vict. c. 41, s. 34.
(*v*) Ibid. s. 41.

CHAPTER III.

THE RIGHTS OF THE SURETY AGAINST THE PRINCIPAL OR CO-SURETY WHO HAS BECOME BANKRUPT.

Statutes in relief of sureties.—52nd section of 6 Geo. 4, c. 16.—Not obligatory on the surety to prove, but the certificate of the bankrupt will discharge the debt.—May proceed against the bankrupt, unless he has received dividends under the creditor's proof.—Statute applies only to sureties for debts due at the time of issuing the fiat, and to those only who were sureties at that time, and to cases only where the surety has paid the whole debt, or part, in discharge of the whole.—What is considered payment.—Person liable.—Import of the expression.—Right of in respect of annuities.—Bills of exchange and promissory notes.—Accommodation bills.—Cross bills.—Right against co-surety.—Effect of certificate.—Ranking in Scotland of sureties on the bankrupt's estate.—Law of France.—Holland.

THE provision in the 8th section of the 49 Geo. 3, c. 121, in favour of sureties is re-enacted by the 52nd section of the 6 Geo. 4, c. 16, and is extended to bail for the bankrupt either to the sheriff or to the action (*a*). Any person who, at the issuing the commission, shall be surety, or liable for any debt of the bankrupt, "or bail for the bankrupt either to the sheriff, or the action," if he shall have paid the debt, or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends, and all other rights under the said commission, which such creditor possessed, or would be entitled to in respect of such proof, or if the creditor

(*a*) Mont. & Ayr. p. 203.

shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors although he may have become surety, liable or bail as aforesaid, after an act of bankruptcy by such bankrupt committed; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed (*b*).

It will be observed, that this enactment does not make it obligatory on the surety to prove against the principal, but it gives him the power of proving. The surety is not bound by the proof of the creditor (*c*). If however he does not exercise that power, yet as his debt was provable, if the surety should bring an action against the bankrupt after he has obtained his certificate, his demand will be barred, because the certificate releases the bankrupt from all claims made provable under the fiat (*d*).

It seems that the surety who pays after the proof by the creditor may in all cases untainted by fraud, proceed at law against the bankrupt (*e*). If a surety pay part of the debt after proof against the principal, he may maintain *indebitatus assumpsit*, against the uncertificated principal for the part paid (*f*). If a bill be proved by the indorsee, who afterwards receives the amount from the drawer, and the drawer arrest the bankrupt for such amount before he obtains his certificate, the

(*b*) 6 Geo. 4, c. 16, s. 52.

(*c*) Mead *v.* Braham, 3 Maul & Selw. 92.

(*d*) Mead *v.* Braham, 3 M. & S. 92. Townend *v.* Downing, 14 East's Rep. 565. Ex parte Lobbon, 17 Vez. 334. 6 Geo. 4, c. 16, s. 121. Vansandau *v.* Crossby, 8 Taunt. 550; 3 B. & A. 13. Westcott *v.* Hodges, 5 B. & A. 12. Ex parte Hughes.

(*e*) Ex parte Lobbon, 17 Ves. 334; 1 Rose, 219. See Townend *v.* Downing, 14 East, 565. Mead *v.* Braham, 3 Maule & Selw. 92.

(*f*) Soutten *v.* Soutten, 1 Dowl. & R. 521; S. C. 5 Barn. & Ald. 852.

bankrupt is not entitled to his discharge, the proof by the indorsee being only deemed an election so far as it personally regarded him (*g*). A party to a bill, to whom it is returned after it has been proved against the acceptor, and who is endeavouring to supersede, and to get the debt expunged, may proceed at law against the uncertificated acceptor (*h*).

But if the surety avails himself of the proof made by the creditor and receives dividends thereon, he is estopped from afterwards proceeding against the bankrupt. Thus where the indorsee of a bill of exchange, of which the bankrupt was the acceptor proved it under the commission and received payment of it from the drawer, and the drawer then received a dividend on the proof, and afterwards arrested the bankrupt who had not obtained his certificate, the Lord Chancellor ordered him to be discharged out of custody (*i*).

The statute extends to those only who become sureties for debts, due at the time of issuing the fiat. A surety for the payment of rent, no rent being due at the time of the bankruptcy, was obliged to pay three years' rent which became due after the bankruptcy; it was held that he was entitled to recover it inasmuch as it was not barred by the bankrupt's certificate (*j*).

It extends only to those who were sureties at the issuing of the fiat. A. and B. gave a joint and promissory note to C. for money lent to them by C. A. was obliged after B.'s bankruptcy to pay the note. It was held that A. could not prove for a moiety of the note against B.'s estate as he was not a surety for B.; but he and B. were both principal debtors (*k*).

(*g*) Mead *v.* Braham, 3 Maule & Selw. 91.

(*h*) Mont. & Ayrt. 173.

(*i*) Ex parte Lobbon, 17 Vez. 334.

(*j*) Macdougal *v.* Paton, 8 Taunt. 584; Eden's Bankrupt Law, 151; Deacon's Bankrupt Law, p. 315. Ex parte Wilson, 1 Rose, 137. Vansandau *v.* Crosby, 3 B. & A. 13; 2 Gl. & J. 36.

(*k*) Ex parte Porter, 4 D. & C. 774.

A. became surety to certain bankers to secure to them all sums then or thereafter to become due to them to a certain amount. The bankers, at the time A. became surety, had knowledge of an act of bankruptcy by the customer. The surety had no knowledge of it, and afterwards paid to the bankers the full amount for which he had became surety, without specifying to what portion of the banker's debt the payment should be applied. It was held, that it should be applied in reduction of that part of the banker's debt which was provable under the fiat, and not to that part of it which was not provable thereunder, so as to leave the surety the right of proof (*l*).

If a surety should after the bankruptcy of the principal pay, besides the debt, the interest which had accrued subsequently to the bankruptcy, he will not be permitted to prove for such subsequent interest (*m*).

The statute applies only to sureties who have paid the whole debt, or part in discharge of the whole, and not where he pays part merely in discharge of his own personal liability. A surety in a warrant of attorney for the purpose of discharging himself, paid to the creditor who had previously proved under the commission part of the debt remaining due to him. It was held that this was not a payment in discharge of the whole debt, and that he could not therefore avail himself of the creditor's proof (*n*).

Indemnifying (*o*) or giving a bond is not payment, nor is executing a warrant of attorney whereon judgment is not entered up (*p*) until after the bankruptcy of the surety (*q*).

(*l*) Ex parte Sharp, 3 M., D. & D. 490.

(*m*) Ex parte Wilson, 1 Rose, 137. Ex parte Houston, 2 Gl. & J. 36.

(*n*) Soutten *v.* Soutten, 5 B. & A. 852.

(*o*) Alsop *v.* Price, 1 Dougl. 160. Ex parte M'Millan, Buck. 287; Mont. & Ayr. B. L. 197.

(*p*) Gaskell *v.* Lindsay, 2 Rose, 469.

(*q*) Ex parte Serjeant, 1 G. & J. 183. Ex parte Hunter, 2 G. & J. 23.

If the creditor prove against the principal, and the surety afterwards pay the whole debt to the creditor, the surety is entitled to the benefit of the creditor's proof(*q*). The surety on bringing the money into Court, may compel the creditor to prove against the principal(*r*). Where the surety had lodged the amount of the debt with a banker, he has been permitted to retake it, to enable the creditor to prove against the principal (*s*).

The words "person liable" in the 52nd section of the 6 Geo. 4, c. 41, Lord Eldon has observed, were adopted for the purpose of comprehending all those who could not strictly be considered as sureties, but who were entitled to the same protection. Thus the acceptor of a bill of exchange is not strictly a surety for the drawer, for the acceptor is liable in respect of his own engagement merely. But if the acceptance is given in respect of a debt of the drawer, and not of the debt of the acceptor, so that as between these parties it is an accommodation bill, the acceptor, if he be not strictly a surety for the drawer, is a "person liable"(*t*).

The party has the benefit of this enactment, although he should have become a party to the bill after an act of bankruptcy, provided he have no notice of it.

If a person lends his name upon a bill, either as drawer, acceptor, or indorser, and has received no value for doing so, he is substantially a surety for the party who has received a consideration for the bill, and if from that party's neglect to provide for the bill he is obliged to pay it, he is entitled to be indemnified by that person. Thus, although the bill is gone by the accept-

(*q*) Ex parte Atkinson, Cooke, 210, 4th ed. Phillips *v.* Smith, cited Ex parte Atkinson, ib.

(*r*) Beardmore *v.* Cruttenden, ib. Phillips *v.* Smith, cited Ex parte Atkinson, ib.

(*s*) Ex parte Atkinson, C. B. L. ib.

(*t*) 3 Vez. & B. 40. Ex parte Walton, 1 Atk. 123.

ance being paid, yet if it be an acceptance for the accommodation of the drawer, and the acceptor after the drawer's bankruptcy is obliged to pay it, the acceptor may prove for the amount (*u*). So the indorsee of a bill for the accommodation of the indorser who has been obliged to pay the bill, in consequence of the default of the acceptor, is entitled to prove against the estate of the indorsee (*v*). And the party may prove the costs, if previously ascertained, of an action brought by the holder of the bill against the acceptor, in consequence of the drawer not meeting the bill (*w*).

When a surety on a note, after the bankruptcy of the debtor paid its amount to the creditor, and the latter had previously proved for a greater amount, it was ordered by Lord Eldon that the surety should receive from the creditor the dividend on the note which had been previously paid to the creditor (*x*).

A surety upon an exchange of acceptances must, before he can be admitted to prove, take up his own bills, or exonerate the bankrupt's estate from any liability in respect of them (*y*).

If A. has accepted bills for the accommodation of B. the bankrupt, and does not pay them when due, and B. has given to A. bills or notes to secure any debt due from B. to A. and if any of such acceptances, bills, or notes, are afterwards negociated and proved by the respective holders against the estate of B., to an amount larger than any cash balance due from B. to A., such cash balance will not be permitted to be proved against B.'s estate. And although A. actually pays any of the bills which have been proved under B.'s fiat, A.'s only claim

(*u*) Ex parte Lloyd, 1 Rose, 4. Stedman *v.* Martinnant, 13 East's Rep. 427. Bassett *v.* Dodgin, 9 Bing. 653, Filley *v.* Langford, 4 Scott. N. R. 208, 611.

(*v*) Haigh *v.* Jackson, 3 Mee. & W. 598.

(*w*) Vansandau *v.* Crossbie, 3 B. & A. 13; 8 Taunt. 550.

(*x*) Ex parte Brooke, 2 Rose, 334. Ex parte Holmes, 4 Dea. 826, reversing S. C. 3 Deac. 662.

(*y*) C. B. L. 162. Ex parte Bloxam, 8 Vez. 531.

is to have the benefit of the proof in respect of the particular bills which he has been obliged to pay (*z*).

The 6 Geo. 4, c. 16, provides also for the relief of the *surety* for the payment of an annuity by the bankrupt, (which the 49 Geo. 3, c. 121, was deficient in,) as well for the relief of the bankrupt himself from the contingent claims of the surety. The 55th section not only compels the person entitled to an annuity to prove under the commission for the value of the annuity, before he can sue any person, who may be a collateral surety for the payment of the annuity, but it enacts, that if the surety, after such proof, shall pay the amount so proved, he is discharged from all claims in respect of the annuity, and he is only liable to be sued for the accruing payments, in the event of his failing to pay the sum proved before any payment of the annuity subsequent to the bankruptcy becomes due, nor is he then liable to pay beyond the amount so proved, with interest at 4*l.* per cent. from the time of his receiving notice of such proof, and of the amount thereof. And, after such payment or satisfaction by the surety, he may then stand in the place of the annuitant, in respect of the proof, to the amount of the sum so paid or satisfied; and the certificate of the bankrupt is then declared to be a discharge from all claims of the surety, as well as of the annuitant, in respect of the annuity. The surety is also entitled to credit in account with the annuitant, for any dividend which the latter may have received, before he can be called upon to pay the whole sum proved by the annuitant under the fiat.

The certificate of the principal in an annuity is a bar to a demand by a surety for payments made by him after the bankruptcy of the principal (*a*). A surety for an annual rent, who pays the rent accruing after the bankruptcy of the principal, is not barred by the certificate. If, at the bankruptcy of the

(*z*) Ex parte Read, 1 G. & J. 224.

(*a*) M'Dougal *v.* Paton, 8 Taunt. 584.

principal, there is 1,300*l.* due, which the creditor proves, and afterwards agree with the surety that he shall pay 500*l.* in discharge of his personal liability as surety, which is paid, and satisfaction entered on the record, the certificate of the bankrupt is no bar to an action by the surety. A., surety by bond to the Crown, that a distributor of stamps shall pay the duties received by him in that office, after the distributor had obtained his certificate was obliged to pay a sum of money due to the crown, it was held, that the certificate was a bar to any demand by the surety, for he might have proved the debt under the commission (*b*).

The 52nd section of the 64 Geo. 4, c. 16, has been held not to extend to the case of co-sureties (*c*).

Where one of three co-sureties paid money on account of the annuity after the bankruptcy of a co-surety, it was held that the latter was liable to an action for contribution, though he had obtained his certificate, inasmuch as one surety could not prove the value of the annuity under the commission against his co-surety. But it was held in this case, that the bankrupt could not, *at law*, be compelled to repay more than one-third of the sum paid on account of the annuity, although the third surety had become insolvent at the time of such payment (*c*).

Upon the bankruptcy of one surety if a co-surety after the bankruptcy pay the debt, the co-surety has a demand against the bankrupt surety, which is not barred by the certificate which the latter may obtain (*d*).

In Scotland, contingent creditors have always been held entitled to claim in bankruptcy, to the effect of having a dividend set apart to answer their demand when the contingency should be cleared. And it is a part of this rule, that a surety,

(*b*) Westcott *v.* Hodges, 5 B. & A. 12.

(*c*) Ex parte Porter, 2 Mont. & Ayr. 261. Clements *v.* Langley, 5 B. & Ad. 372.

(*d*) Browne *v.* Lee, 6 B. & C. 689. Ex parte Porter, *supra*.

whether by bond, bill, note, or otherwise, has a right to claim in bankruptcy to the effect of having a dividend set apart for the debt, should the creditor not have proved, and of entitling the surety, if the creditor have proved, to stand in the creditor's place, and have the benefit of his proof on paying the debt (*e*).

The general doctrine of the ranking of accommodation and cross bills, seems reducible to the following propositions:—

1. There can be no double claim, directly or indirectly, grounded on the same debt. It is a corollary from this rule, that one who engages as surety for the bankrupt can be ranked no otherwise, by direct or indirect means, than to the effect of having a dividend set apart to answer the debt when he shall have paid it.

2. Mutual accommodation bills exchanged are good considerations for each other.

3. The dividend which is paid by a bankrupt estate, is payment by that estate of all that can be demanded in respect of that debt.

It is a corollary from this principle, that the balance between two bankrupts' estates, where cross bills have passed between the bankrupts, can in no degree depend on a difference in the amount of dividend paid by the estates respectively.

4. A distinction is to be observed between the bankrupt estate and the bankrupt himself, the bankrupt continuing bound to indemnify his sureties, where he has not obtained his discharge.

These propositions seem to comprise the doctrine of cross bills; and the farther explanation of the subject will consist only of a commentary on the several cases by which those points are settled.

1. That there can be no double proof on the same debt, is settled as a radical principal in bankrupt law.

(*e*) 2 Bell's Comm. 527.

A surety is, at least a contingent creditor, and may claim as such where the creditor in chief has not claimed, to the effect of having a dividend set apart till he shall have paid the debt. But a surety who receives a separate note or bill, the sole consideration of which is his engagement as surety, is nothing more than a contingent creditor; and no other effect can correctly be given to such separate note or bill in Scotland than is in England allowed in the same circumstances (*f*).

The Code de Commerce of France of 1838 contains the following provisions: "Le créancier porteur d'engagements souscrits, endossés ou garantis solidairement par le failli et d'autres co-obligés qui sont en faillite, participera aux distributions dans toutes les masses et y figurera pour la valeur nominale de son titre jusqu'à parfait paiement" (*g*).

"Aucun recours, pour raison des dividendes payés, n'est ouverts aux faillites des co-obligés les unes contre les autres, si ce n'est lorsque la réunion des dividendes qui donneraient ces faillites excéderait le montant total de la créance en principal et accessoires: auquel cas cet excédant sera dévotée suivant l'ordre des engagements à ceux des co-obligés qui auraient les autres pour garants" (*h*).

"Si le créancier porteur d'engagements solidaires entre le failli et d'autres co-obligés a reçu avant la faillite un à-compte sur sa créance, il ne sera compris dans la masse que sous la déduction de cette à-compte, et conservera, pour ce qui lui restera dû, ses droits contre le co-obligé ou la caution. Le co-obligé, ou la caution qui aura fait le paiement partiel sera compris dans la même masse pour tous ce qu'il aura payé à la décharge du failli" (*i*).

"Nonobstant le concordat, les créanciers conservent leur

(*f*) Bell's Comm. 528.
(*g*) Art. 542.
(*h*) Ib. 543.
(*i*) Ib. 544, 545.

action pour la totalité de leur créance contre les co-obligés du failli" (*j*).

The Commercial Code of Holland contains a similar provision: "Le créancier qui est porteur d'une obligation solidaire, qui existe entre le failli et d'autres co-débiteurs également faillis, peut participer à tous les masses jusqu'à ce que sa créance ait été payée en totalité."

"Le créancier qui est garanté par une caution participite à la masse du failli pour sa créance, sous la déduction de ce qu'il à reçu de la caution.

"La caution exerce ses droits pour tous ce qu'elle a payé à la décharge du failli."

(*j*) Art. 878.

CHAPTER IV.

PARTNERS—DEBTORS IN SOLIDO—RIGHTS OF CREDITOR AND SURETY.

I. Application of joint estate to joint and separate estate to separate creditors.—Joint creditor excluded from coming in under separate fiat against one of the partners until separate creditors have received 20*s.* in the pound, except when there is no joint estate, or no solvent partner.—When it may be said there is no joint estate so as to exclude from the rule.—If solvent partner, although no joint estate separate creditor cannot prove.—Exception, a joint debt becoming a separate debt.—Separate creditors cannot prove against joint estate until joint creditors have received 20*s.* in the pound.—Creditors having separate and joint securities may prove against either estate, but must elect.—When the creditor has no election.—Proof between partners.—Different firms composing one general firm.—Exception.—Effect of certificate of one partner.

II. Difference between the jurisprudence of other countries and that of England as to the rights of joint creditors against the separate estates of bankrupts.—And the claims of partner's creditor on the bankrupt partner.

PARTNERS it has been already seen are at law joint debtors; both must be sued, and upon the death of either, the creditor can bring his action only against the survivors or survivor, and has no remedy against the estate of the deceased. But where he has obtained judgment against the members of the partnership firm he may execute it against the person or property of all and each of them. A Court of Equity treats partners as being liable jointly and severally, and the creditor has a right to resort to the estate of a deceased co-partner (*a*).

In bankruptcy the creditor of the partners, that is, a joint creditor is, except in the cases which will be presently mentioned, confined to the estate of the partnership and can not

(*a*) *Supra*, p. 404.

resort to the separate estates of the partners until the separate creditors of the partner have received twenty shillings in the pound on their debts. The great principle on which the bankrupt law administers the joint and separate estates of the partners is to leave the separate estate to the separate, and the joint estate to the joint creditors of the bankrupt. The 62nd section of the 6 Geo. 4, c. 16, enacts with some addition that which had been the old rule fixed by Lord Loughborough's order of the 8th March, 1794, and the general practice.

"In all commissions against one or more of the partners of a firm, any creditor to whom the bankrupt, or bankrupts is or are indebted, jointly with the other partner or partners of the said firm, or any of them, shall be entitled to prove his debt under such commission for the purpose only of voting in the choice of assignees under such commission, and of assenting to, or dissenting from the certificate of such bankrupt or bankrupts, or of either of such purposes: but such creditor shall not receive any dividend out of the separate estate of the bankrupt or bankrupts, until all the separate creditors shall have received the full amount of their respective debts: *unless such creditor shall be a petitioning creditor in a commission against one member of a firm.*"

This rule had been relaxed by Lord Thurlow, and when there were no joint effects, or even where there were, when the justice of the case required it, he allowed joint creditors to prove under separate commissions and to receive dividends rateably with the separate creditors. His reasoning which it is difficult to answer was, that a joint creditor ought not to be deprived by a commission of bankruptcy of the rights which he possessed at law against the separate estates, as well as the joint estate of the partners. For a joint creditor of several partners might have taken out separate executions against each, that a commission of bankruptcy was an execution for all the creditors, and prevented him suing out his execution at law

with effect. It ought, therefore, to be considered at least as beneficial as for him as for any other creditor of the bankrupt (*b*). But Lord Loughborough, and subsequently Lord Eldon have established, and it is the settled rule that a joint creditor is not entitled to receive dividends from a separate estate, if there is any joint fund (however small its amount), or any solvent partner until the separate creditors are paid 20*s.* in the pound (*c*).

If, however, the joint property is of such a nature, or in such a situation that the attempt to render it available to the creditors is either desperate or would be attended with such expense as not to justify it, or if the joint property was pledged to an amount exceeding its value, it is, as it well may be, considered that there is no joint property, and the rule is not applied (*d*).

A. and B. were in partnership. They dissolved, A. retiring from it, and B. continuing the business under another form. A., on the dissolution, assigned his moiety of the co-partnership effects to B., and B. agreed to indemnify him against all the debts of the partnership. At that time there was a debt of 1270*l.* owing by the partnership to C., who continued to deal with B. without any rest in the account until the bankruptcy of B. It was decided that this sum could not be proved against the separate estate of B., as it was not satisfactorily seen that there was no joint estate, or that C. had accepted B. as his separate debtor (*e*).

(*b*) Ex parte Hodgson, 2 Bro. 5. Ex parte Page, ibid. 119. Ex parte Flintum, ibid. 120. Ex parte Copland, C. B. L. 236. Evan's Bankrupt Statute, 211. Sir W. Evan's Letter to Sir Samuel Romilly. Christian, B. L., vol. 2, 36.

(*c*) Ex parte Clay, 6 Ves. 813. Ex parte Sadler, 15 Ves. 52. Ex parte Taitt, 16 Ves. 193. Ex parte Peake, 2 Rose, 54. In re Lee, ibid. note. Ex parte Leaf, 1 Deac. 176.

(*d*) Ex parte Peake, 2 Rose, 54, per Lord Eldon. Ex parte Hill, 2 N. R. 191.

(*e*) Ex parte Appleby, 2 Deac. 482.

But if C. had accepted B. as his separate debtor, then C. might have proved under the separate fiat against B. (*f*).

The decisions do not appear to be uniform in the application of this rule to the case of joint contractors. Thus, where A. and B. made their joint promissory note for the payment of a debt by B., and A. became bankrupt, it was held that the payee might prove the amount of the note against the estate of A., and that he was not prevented by the rule that applies in the case of partnership where it must appear that there was no joint estate, and no solvent partner (*g*). And in *Ex parte Buckingham*, it was decided that the rule was confined to partnerships (*h*). But in *Ex parte Field*, the Chief Judge in Bankruptcy held that the rule equally applied to co-contractors (*i*).

If, however, joint creditors are under special circumstances permitted to prove against separate estates, and they prove against one or more of them exclusively of the rest, if there should afterwards be realised any joint property, the estates so burdened with the proof are entitled to be reimbursed out of such joint property to the extent of the proofs made against them, before such joint property is divisible between the joint and separate estates (*j*).

Where bankrupts have been bound jointly and severally to the Crown, and the joint estate had paid more than its proportion, contribution was decreed between the joint and separate estates (*k*).

A solvent partner, who has paid all the debts of the partnership, or indemnified the bankrupt's estate against them, has a right to prove against the bankrupt partner (*l*).

(*f*) Ex parte Bradbury, 4 Deac. 202.
(*g*) Ex parte Corsfield, 1 Dea. 405.
(*h*) 1 M., D. & D. 235.
(*i*) Ex parte Field, 3 M., D. & D. 95.
(*j*) Ex parte Willock, 2 Rose, 392. Ex parte Wylie.
(*k*) Rogers *v.* Mackenzie, 4 Vez. 752.
(*l*) Ex parte Young, 2 Rose, 40; 3 V. & B. 35. Ex parte Taylor, ib.

If a solvent partner pay all the joint debts, and prove against the separate estates of his bankrupt co-partners for the respective sums each is bound to contribute, if the estate of one of the bankrupts is not sufficient to pay 20*s.* in the pound, it has been made a question whether the solvent partner can come against the other bankrupt's estate for his proportion of that deficiency, besides the original contributory proportion already proved against the estate. In the case of *Ex parte Smith* (*m*), it was decided that he could not, but Lord Eldon, on this case having been brought before him on appeal, decided that he could (*n*). His Lordship said that he took it to be clear that if A. have two partners, and he pay more than his share, and one of his partners is insolvent, that insolvency is a mischief in which the other partner must partake, as well as he who seeks to prove. But if one partner only indemnifies the joint estate against the claims of the joint creditors, and does not actually pay the joint debts, *or pay part in satisfaction of the whole*, this will not entitle him, under the 6 Geo. 4, c. 16, s. 52, to prove against his co-partner.

If there is a solvent partner, although there may be no joint estate, the joint creditor is not permitted to prove under a separate fiat against the bankrupt partner, on the ground that this would materially affect the separate creditors (*o*). Lord Loughborough, with reference to this rule, observes, that if after so proving a debt a joint creditor was to receive a dividend of 10*s.* in the pound, the assignees of the bankrupt partner would have no claim against the solvent partner, as the latter would, in that case, be entitled to set off as against them the other

175; 3 V. & B. 35. Ex parte Ogilvy, 3 V. & B. 133. Wood *v.* Dodgson, 2 M. & S. 195. Ex parte Watson, Buck. 449. See also 9 Ves. 590; 2 V. & B. 212.

(*m*) Buck. 492.

(*n*) Ex parte Moore, 2 G. & J. 166.

(*o*) Ex parte Kensington, 14 Vez. 447. Ex parte Kendall, ib. 449.

moiety of the debt which he himself might have paid to the creditor. But in case the creditor first sues the solvent partner, and recovers the whole debt against him, the latter would then come in as a separate creditor of the bankrupt to the amount only of a moiety of the debt, for he could have recovered only a moiety of the debt against his co-partner if he had continued solvent (*p*).

If, however, the solvent partner is abroad, and not likely to return, and there is no joint property, a joint creditor may prove and receive dividends under the fiat against the other partner (*q*).

Although at the time of issuing the fiat there should be a solvent partner, yet if at the time the joint creditor applies to prove there is no solvent partner, his proof will be admitted (*r*). So although the estate of a deceased partner may be solvent if there be no joint estate, and no solvent partner living, the proof by the joint creditor will be admitted (*s*).

The *mere insolvency* of the partner, or even his application to take the benefit of the Insolvent Debtors' Act, does not entitle the joint creditor to prove against the separate estate of the other partners, for insolvency does not imply that the party has no property, and whilst there is any other fund, however trifling the amount, the joint creditor is not permitted to prove against the separate estate of the bankrupt partner (*t*).

A joint creditor, who is the petitioning creditor under a separate commission, has the power of electing, to prove either upon the joint or the separate estate. If he had sued out a joint commission against the whole firm, or against the sur-

(*p*) Ex parte Elton, 3 Vez. 240.

(*q*) Ex parte Pinkerton, 6 Vez. 814. Ex parte Machell, 2 V. & B. 216.

(*r*) Ex parte Jones, 1 Mont. Dig. 238.

(*s*) Ex parte Bauerman, 3 Deac. 476.

(*t*) Ex parte Jansen, 3 Mad. 229; Buck. 227.

vivor *as surviving partner*, he binds himself to resort to the joint property (*u*).

Although a partner should withdraw the monies of the partnership for his own separate use, yet if he openly enters the amount so withdrawn in the co-partnership books, this is not such a fraud as will entitle the joint creditors to prove against his separate estate. If, however, he had omitted or inserted it in his book in such a manner as to disguise it, they would have that right (*v*).

Judgment of outlawry against two of three joint debtors does not convert the joint into a separate debt, so as to entitle the joint creditors to prove against the separate estate (*w*).

The separate creditors have no right under a joint fiat to receive dividends from the joint property until all the joint creditors have received 20*s.* in the pound (*x*). But where two partners agreed to borrow a sum of money for the use of the partnership, for which one of the partners only gave his bond, and the other was the witness to it, but the money was entered in the cash book, it was decided that the obligee might prove on the joint estate (*y*). And a similar decision was given where the money was lent on the joint notes and the several bonds of the partners, and the whole of the money applied to the use of the partnership, the partners agreeing to consolidate the separate debts, and consider them debts of the partnership (*z*).

Where the bankrupt, whilst a sole trader, was indebted by bond, and then took in a nominal partner, and afterwards a joint commission was issued, the obligee was not permitted

(*u*) Ex parte Hall, 9 Vez. 349. Ex parte Burnet, 2 M., D. & D. 357. Ex parte Barnard, 1 G. & J. 309.

(*v*) Ex parte Smith, 1 G. & J. 74.

(*w*) Ex parte Dunlop, Buck. 253.

(*x*) Lord Loughborough's Order 8th March, 1794; 1 C. B. L. 232.

(*y*) Ex parte Brown, 1 Atk. 225. Ex parte Clowes, 2 Bro. 595.

(*z*) Ex parte Clowes, 2 Bro. 595.

to prove against the joint estate, but it would have been otherwise if the partnership, by paying interest, or in any other manner had assented to, or adopted the original debt (*a*).

The application of trust money to the purposes of the co-partnership, by a partner being a trustee, when it is made without the knowledge of his co-partners, does not create a contract between the partnership and the *cestui que* trust, so as to entitle the latter to prove against the joint estate. But if he had made such application with the knowledge of his co-partners, or if with common diligence they might have known the fact, the *cestui que* trust will be allowed to prove against the joint estate (*b*). One of several partners, who was also one of several trustees of certain stock, forged the name of his co-trustees to a power of attorney empowering his co-partners to sell the stock; they accordingly sold it, and the produce was paid into the banking-house of the partners, although the other partners had no knowledge of the forgery, and the criminal party chiefly conducted the business of the partnership. It was held that the money thus received by the partnership constituted a joint debt from the partnership to the trustees, for no ignorance on the part of the other members of the firm, even supposing them to have been ignorant of the facts, nor any neglect on the part of the firm from their misplaced confidence in one of their partners, to which the trustees were no parties, could deprive them of their right to the money (*c*).

A. and B. were employed by C. as stock-brokers, and for the convenience of transfer they allowed the stock to stand in the name of A. alone, who, without the consent or knowledge of B., sold the stock and paid the produce into the partnership

(*a*) Ex parte Jackson, 1 Vez. J. 131. Ex parte Williams, Buck. 13.

(*b*) Ex parte Apsey, 3 Bro. 265. Marsh *v.* Keating, 1 Bing. N. C. 198. Stone *v.* Marsh, 6 B. & C. 551.

(*c*) Stone *v.* Marsh, 6 B. & C. 551. Ex parte Bolland, 1 Mont. & M. 315. Hume *v.* Bolland, Ry. & M. 371. Smith *v.* Jameson, 5 T. R. 601. Ex parte Watson, 2 V. & B. 414.

funds of A. and B. They afterwards became bankrupts. It was held that C. was entitled to prove against either the joint or separate estates of A. and B. (*d*).

Money was borrowed by one partner to pay for an estate which he had purchased, but he applied it to the purposes of the partnership. The lender was held not entitled to prove against the joint estate (*e*).

A creditor who has a joint and several security, either by one instrument, or by distinct and independent instruments, may come in either against the joint or separate estates, but he must make his election, for he cannot prove against both estates at the same time (*f*).

But if on a joint and several bond by B. and C. to A., judgment be entered up on the joint warrant of attorney, given as part of the security, the bond is merged in the judgment, and A. can only prove against the joint estate of B. and C. (*g*).

If, however, a joint creditor has a separate security from one of his co-debtors, he may prove his debt against the joint estate without the surrender or sale of his security (*h*).

If there be a dormant partner, and the fact was unknown to the creditor, he may consider his debt, either joint or separate, but he must elect against which estate he will prove (*i*). And although the creditor had notice of there being a dormant partner, yet he is entitled to prove his debt *pari passu* with those who were creditors of the firm before the dormant partner was admitted (*j*).

(*d*) Ex parte Turner, Mont. & M. 255.

(*e*) Smith *v.* Jameson, 5 T. R. 601.

(*f*) Ex parte Hill, 2 Dea. 249.

(*g*) Ex parte Christy, 2 D. & C. 155.

(*h*) Ex parte Peacock, 2 G. & J. 27. Ex parte Roding, ibid. Ex parte Plummer, 2 M., D. & D. 204.

(*i*) Ex parte Hamper, 17 Vez. 403. Ex parte Mathews, 18 Vez. 125. Ex parte Hodgkinson, 19 Vez. 294. Ex parte Norfolk, ib. 450. Binford *v.* Dommett, 4 Vez. 756.

(*j*) Ex parte Chuck, Mont. 364, 457; 8 Bing. 469; 1 Mont. & S. 615.

Where there are distinct firms, and the holder of a bill at the time he takes it is ignorant that they are all engaged in one general partnership, if any one of the firms draws on the other, either the aggregate firm on the minor firm, or the minor firm on the aggregate, the holder may prove against the estate of the general partnership, and against that also of the minor firm (*k*). And it has been decided, that although the holder had notice of the joint interest of two different firms on a bill, who were engaged in a joint adventure, he was entitled to prove on the bill against both estates (*l*).

But it seems this right cannot be exercised in case of an individual partner separately trading, but only in those cases where there is a plurality of partnerships, as well as of trades (*m*).

If the parties on the bill are not distinct firms, that is, where no member of a partnership carries on trade on his separate account, and one of the partners draws upon the general firm, or the general firm upon the individual partner, or if the holder of the bill, at the time he took it, had notice that the different parties on it were included in one general partnership, notwithstanding he procures the separate indorsement of one of the partners on the bills for the express purpose of raising a contract for double security, he cannot prove against both the joint and separate estates, but is put to his election (*n*).

If upon the dissolution of a partnership consisting of two persons, the one continuing in business covenants to pay all the joint debts, and the joint creditors have not, previous to the

(*k*) Ex parte La Forest, 1 C. B. L. 251. Ex parte Bonbonus, ibid. Ex parte Benson, ibid. Ex parte Adam, 2 Rose, 36.

(*l*) Ex parte Wenslay, 1 Rose, 441; 8 Vez. 546.

(*m*) Ex parte Moult, 1 Deac. & C. 44. 2 Deac. & C. 419, Ex parte De Mattos, 1 M. & A. 345.

(*n*) Ex parte Bigg, 2 Rose, 37. Ex parte Bank of England, 2 Rose, 82. Ex parte Law, 3 Deac. 541. Ex parte Husbands, 2 G. & J. 4. Eden's B. L. 170, *et seq.*

bankruptcy, accepted the continuing partner as their sole debtor, they have not an election to prove against the separate estate of the continuing partner, but their right of proof is against the joint estate alone (*o*).

But upon the dissolution of the partnership, consisting of A., B. and C., where A. and B. agreed to pay all the debts, and D., a creditor of the old firm, without any knowledge of the terms of the dissolution, applied for payment, and drew a bill on A., B. and C., which A. and B. accepted in the name of the old firm, but without C.'s authority; It was held that D. had the option to treat it either as the debt of the three, or of the two, and might prove the amount under a joint fiat against A. and B. (*p*).

If a creditor having this right of election has proved against one estate, and the other estate has a surplus after the payment of its own debts, he may then come in, and participate in such surplus in respect of that part of his debt which remains unsatisfied (*q*).

But, having elected to go against the joint estate, he has no claim of preference over the other joint creditors upon the surplus of the separate estate (*r*).

A partner cannot prove under a commission against his co-partner, so as to come in competition with the creditors of the co-partnership (*s*). He can receive no portion of his debt

(*o*) Ex parte Freeman, Buck. 49. Ex parte Fry, 1 G. & J. 96. Ex parte Fell, 10 Ves. 347.

(*p*) Ex parte Liddiard, 4 D. & C. 603.

(*q*) Ex parte Rowlandson, 3 P. Wms. 405. Ex parte Parmenter, cited 1 Atk. 99. Ex parte Banks. Ex parte Bond, ib. 98. Ex parte Blankenhagen, 1 C. B. L. 249. Ex parte Hay, 15 Ves. 4. Ex parte Masson, 159.

(*r*) Ex parte Bevan, 10 Ves. 109.

(*s*) Ex parte Burrel, C. B. L. 532. Ex parte Parker, ibid. Ex parte Pine, ibid. Ex parte Broome, 1 Rose, 69. Ex parte Reeve, 9 Ves. 588. Ex parte Robinson, 4 D. & C. 499. Ex parte May, 3 Dea. 382. Ex parte Carter, 2 G. & J. 233. Ex parte Ellis, ib. 312. Ex parte Porter, 4 Dea. & C. 774.

until all the creditors of the partnership have received 20s. in the pound, and also all interest due on their respective debts, subsequent to the date of the commission. The same rule is adopted if all the parties are bankrupts between their different estates. The separate estate of one partner cannot claim against the joint estate in competition with the joint creditors, nor can the joint estate claim against the separate estate in competition with the separate creditors (*s*).

This rule is not applicable in some cases. Thus, where it was agreed between A. and B. that B. should share A.'s profits in the concern, B. was allowed to prove against A.'s estate for the half of the profits (*t*). So, where A. was a dormant partner with B., and dissolved the co-partnership, and B. was indebted to A. in a balance for which he was sued by A., and then gave a cognovit for the debt and costs, it was held, that A. was entitled to prove the debt against the estate of B., although some of the partnership debts were unpaid. So, where the executors of a deceased partner carried on business with the survivors for twelve months longer, and then dissolved the co-partnership, and, upon the dissolution, the surviving partners gave the executors a bond to secure the balance due to him, and more than six years afterwards the survivors became bankrupts, it was held, that the executors were entitled to prove the amount due on the bond against their joint estate (*u*).

There are also two exceptions to this rule, first, where money or effects have been fraudulently abstracted from the one estate to benefit the other. If one partner takes the property of the partnership and apply it to his own use, without the knowledge of the other partners, and to the prejudice of the partnerships' estate, this is such a case of fraud as brings it within the excep-

(*s*) Ex parte Grill, C. B. L. 534. Ex parte Hunter, ib.

(*t*) Ex parte Dodgson, Mont. & M. 445.

(*u*) Ex parte Grayzbrooke, 2 D. & C. 186. Ex parte Hall, 3 Dea. 125.

tion to the rule; and the assignees of the joint estate may prove the amount so abstracted against the separate estate (*v*). The term "fraud" is used to distinguish the transaction from a taking by contract or loan, or a taking with the express or implied authority of the other parties.

The exception would also prevail if the money were retained by such partner, with the knowledge of the other partners, but under circumstances affording no ground for inferring their subsequent approbation (*w*).

If there be a surplus of the joint estate, the separate creditors of the partner who has been defrauded will be preferred to the separate creditors of the partner who has practised the fraud (*x*). Nor is the right of proof prevented by the solvency of either of the partners, but they may have the same rights as if both partners were bankrupts (*y*).

But if the partner has been enabled to abstract the property by the other partners having given him a dominion and control over the property, contrary to the articles of co-partnership, as where the articles of co-partnership provided that the money belonging to the concern should be paid into the bankers' in their joint names, yet the one partner permitted the others to pay in the partnership monies, and draw them out from time to time in his separate name, this would be such an acquiescence of one partner in what necessarily gave the other the whole control of the property, that he must abide by the consequence of his own conduct, and such a case would not be excepted from the rule (*z*). But if, under the articles of the partner-

(*v*) Ex parte Lodge, 1 Ves. Jun. 166. Ex parte Cust, C. B. L. 535. Ex parte Turner, 1 M. & A. 54, 357, 4 D. & C. 169. Ex parte Watkins, 1 Mont. & M. 57.

(*w*) 2 V. & B. 213. Ex parte Yonge, 3 V. & B. 35.

(*x*) Ex parte King, 17 Vez. 115.

(*y*) Ex parte Young, 2 Rose, 40; 3 V. & B. 35. Wright *v.* Hunter, 1 East, 20.

(*z*) Ex parte Harris, 1 Rose, 437; 2 V. & B. 210. Ex parte Smith, 6 Mad. 2.

ship, he had been intrusted and empowered to draw bills and manage the cash concerns of the firm, the pledging of the credit, and the using of the notes and names of the partnership for his own purpose, without the consent of his own partner, would not have afforded ground for inferring such acquiescence on the part of the latter, in his exercising dominion over the partnership property, and the case would not, therefore, be excluded from the exception (*zz*).

The other exception to the rule is where some one or more of the members of a partnership form an entirely distinct firm, carrying on a trade different from that of the general partnership, where the articles of one trade have been furnished by one firm to the other. In this case, the one firm may prove on the estate of the other firm (*a*).

But, in order to give the one firm this right against the others, the trade of the one must be wholly distinct and different from that of the others, and not merely branches of the joint concern. A partnership of three, as cotton manufacturers in Lancashire, and two of that partnership having a branch of the same business in London, could not prove against the estate of the other; but if the one had been cotton manufacturers, and the other ironmongers, or any other different trade, such proof would have been allowed. Thus, A. and B. were partners as insurance brokers; A. carried on a separate trade as an oilman, B. became indebted to the firm of A. and B.; the assignees of the joint estate were held entitled to prove against his separate estate (*b*).

But, although a joint trade may prove against a separate

(*zz*) Ex parte Young, 2 Rose, 40; 3 V. & B. 35.

(*a*) Ex parte Cook, Mont. 228. In re Shakeshaft, C. B. L. 538. Ex parte Hargreaves, 1 Cox, 440. Per Lord Eldon, 11 Ves. 414. Ex parte Ring, C. B. L. 538. Ex parte Freeman, ib. Ex parte Johns, ib. Ex parte Heskam, 1 Rose, 146. Ex parte Castell, 2 G. & J. 124.

(*b*) Ib. Ex parte, St. Barbe, 11 Ves. 413.

trade, yet it has been held, that one of the partners, although carrying on a separate trade, and furnishing goods as a separate trader, cannot prove under a commission against his co-partners until all the joint creditors have been paid the principal and interest of their debts.

In none of these cases, Lord Eldon observed, in which the partner constituting a distinct house has ever been admitted to prove, has the estate (against which he has been so admitted) been liable with that distinct house for joint debts:—the principle being, that a solvent partner shall not be admitted to prove in competition with creditors who have a demand against himself(*c*).

The consideration for the debt which the one firm can prove against the other must be for articles of one trade furnished to the other trade, and not for money advanced; therefore, when the debt accrued from the aggregate firm to the separate trade, in respect of monies provided for the aggregate firm, on the credit of the indorsement of the separate firm, Lord Eldon held, that, in this case, no proof could be made by the separate firm against the aggregate one, as this could not be considered a transaction between trade and trade (*d*). Thus where two of three partners, who were ironmasters, and carried on a distinct trade as bankers, but were not the ordinary bankers of the aggregate firm, made advances at different periods for the purpose of relieving it when it was in a state of difficulty and pressure, and under such circumstances as to lead to the inference that the advances would not have been made, had not the bankers been partners in the iron business, it was held, that these advances could not be considered as dealings between trade and trade, and, consequently, that the firm of the two could not prove against the firm of the three (*e*).

(*c*) Ex parte Adams, 1 Rose, 305.
(*d*) Ex parte Sillitoe, 1 G. & J. 374. Ex parte Cook, Mont. 228.
(*e*) Ex parte Williams, 3 M., D. & D. 431.

The certificate will not discharge any person who was a partner with the bankrupt at the time of the bankruptcy, or who was then jointly bound, or had made any joint contract with him (*f*). Neither does the certificate of the surviving partners release the estate of a deceased partner (*g*). So, though the certificate will discharge one of several covenantors for the payment of an annuity, it will not discharge his co-sureties from the claim of the annuity creditor (*h*). Nor will the certificate of a co-surety for the payment of an annuity, be a discharge as to the claims for contribution of another co-surety, in respect of money paid on account of the annuity after the bankruptcy, inasmuch as one surety cannot prove the value of the annuity under a commission against his co-surety. The certificate operates as an extinguishment of debts contracted by the wife of the bankrupt, *dum sola*, and they do not revive against her upon the death of the husband (*i*).

It has been seen that it was a principle of the civil law, and of the systems of jurisprudence founded on it, to treat several persons who had entered into a contract with another, as having each contracted only for his own part, and not as liable *in solido*, unless the contract expressly made them so. The opposite principle, however, was adopted as to contracts with partners in respect of their concern (*j*). The latter principle was established in France by the Ordonnance de Commerce of 1673, c. 4, art. 7, and is still followed (*k*). It was so by the law mer-

(*f*) 6 Geo. 4, c. 16, s. 121. This provision was taken from the 10 Ann. c. 15, s. 2.

(*g*) Sleech's case, 1 Meriv. 570.

(*h*) Baxter *v.* Nicholls, 4 Taunt. 90. Brown *v.* Carr, 2 Russ. 600; 7 Bing. 508; 5 Moore & P. 497. Browne *v.* Lee, 6 B. & C. 689.

(*i*) Lockwood *v.* Salter, 2 Nev. & M. 255.

(*j*) Voet, lib. 17, tit. n. 13. Burgund. de Duob. Reis. c. 17.

(*k*) Pardess. Droit. Comm. tom. 2, n. 182; tom. 4, n. 971, 1049. Code de Comm. Art. 534.

chant of every other part of Europe. Under these different systems of jurisprudence, the creditors of the co-partnership are entitled to have the co-partnership estate applied, in the first instance, to the payment of their demands, in exclusion of the separate creditors of the partners, and so far the rule agrees with that adopted under the bankrupt law of England. But, instead of having the separate estates applied in the first instance, to the payment of the demands of the separate creditors, in exclusion of the joint creditors, the joint creditors are entitled to resort to the separate estates of the partners, and as part of that separate estate to their respective interests in the co-partnership (*l*).

In Scotland, partners are also liable *singuli in solidum* (*m*). The right of the creditors of the co-partnership to claim against the separate estates of the partners, the balance left unpaid from the funds of the company, was fixed by the affirmance of the House of Lords (*n*).

Under the Sequestration Statutes of Scotland, where creditors claim on the estate of a partner of a company, in respect of a debt due by such company, the trustees on the estate of such partner are required, before ranking such creditors for payment of a dividend, to put a valuation on the estate of the company, and deduct from the claims of such creditors such estimated value, and rank, and pay to them a dividend only on the balance (*o*).

A creditor on the estate of a company is not bound for the purpose of voting on the company's estate, to deduct from his claim the value which he may be entitled to draw from the estates of the partners; but if he claims on the estate

(*l*) Rote de Genes, Decis. 30, n. 5, s. 46. Stat. de Genes, lib. 4, c. 12.
(*m*) 2 Bell. Comm. 618, 637.
(*n*) Trustee for Carlyle and Companys' Creditors, 4th July, and 8th August, 1776, M. Society, App. 2; 2 Bell's Comm. p. 661.
(*o*) 1 & 2 Vict. c. 41, s. 38.

of a partner, he must, before voting in his oath, put a specified value on his claim against the estates of the company, and also against the other partners thereof, in so far as they are liable to relieve such partners, and deduct such value from his debt, and specify the balance, and he is then entitled to vote as a creditor for the said balance, and no more, without prejudice to the amount of his debt in other respects.

If one of the partners is indebted to the co-partnership, the latter is entitled to enter a claim on the bankrupt's estate for the balance, after giving his separate estate credit for his share of the stock and profits due to that partner (*q*).

The creditors of a partner in a solvent company, who becomes a bankrupt, are entitled to demand from the company his share of the stock and profit, or the amount of any advances which he may have made to the company. To that extent he is a creditor of the company, and his creditors are his assignees. But, as they come into his place, they take his right, such as it is; and so the debts of the company must first be deducted, neither the partner nor his creditors having any right to enter into competition with the creditors of the company.

If a solvent partner pay all the debts of the partnership, and have to claim against insolvent co-partners, he will be entitled to come against their estates, as in a case of joint cautionary (*r*).

On the bankruptcy of a partnership, accompanied by the bankruptcy of its partners, claims may be entered by the creditors of the company against the estates of the company, and also against the separate estates of the partners. The creditors of the company have not only a right to the funds and estate of the insolvent company, to the entire exclusion of the sepa-

(*q*) Ibid. 2 Bell's Comm. 650.
(*r*) Ibid. 660.

rate creditors of the partners; they have besides a right to claim against the estates of the several partners (as guarantees of the credit of the company,) the balance that shall remain, after deducting the sums drawn or to be drawn from the estate of the company (*s*).

(*s*) 2 Bell's Comm. 650.

CHAPTER V.

APPLICATION OF BANKRUPT'S ESTATE—THE LAW WHICH GOVERNS.

THE preceding Chapters of this Book will have presented questions on which there is an essential difference between the Bankrupt laws of different countries. Two instances of that difference may be selected for the purpose of ascertaining the principles which should determine what law, in the conflict between these two opposite laws, ought to be adopted. By the law of England, a joint creditor is not permitted to resort to the separate estates of the partners until their separate creditors have received 20*s.* in the pound. In Scotland and the other States of Europe, the joint creditor has the right not only to resort to the joint estate, to the exclusion of the separate creditors of the co-partnery, but he may at the same time also resort to the separate estates of the partners. A. and B., carried on trade in co-partnership in Holland, and *there* they contracted a debt with C. They afterwards leave Holland and become domiciled in England, where they carry on trade, and where also they become bankrupts, and a fiat is issued against them. C. comes in under the fiat in England. He proves against the joint estate, and *he* also claims to prove against the separate estates of the partners. He insists that according to the *lex loci* A. and B. were liable *singuli in solidum* in respect of their debt to him, that his right to resort to the estate of each was incident to, and part of his contract, and ought to be recognised everywhere. He urges taht effect is given to the preference or privilege attached to the debt, by the law of the country in which the debt was con-

tracted, and was to be paid. The vendor's lien on moveables sold, and the right to stop them *in transitu* for the payment of the price are privileges which attach to the subject sold, and are governed by the *lex loci contractus* (*a*).

Another instance is that of a demand which in England, because it was in respect of unliquidated damages, would not be admitted to proof, but in Scotland and the other systems of jurisprudence would entitle the creditor to enter a claim, and have the damages liquidated and receive a dividend. The contract, for the breach of which the damages are claimed, may have been made in Scotland, or any other country, between the creditor and a trader, then domiciled there, but who had subsequently removed to, and become domiciled in England, and had become bankrupt, and a fiat issued against him; the creditor would make a claim on the bankrupt's estate in respect of such damages, and he would urge the same reasoning in support of his claim.

It would be difficult to give, and, indeed no answer could be given to this reasoning, if the preference or privilege of the creditor, as to the order or manner in which this demand is to be paid could be considered otherwise than with reference to, and in connection with the means by which alone it is made effectual, or, in other words, if the privilege or preference could be considered except with reference to, and in connection with, the property against which it was to be enforced.

In the case of a lien on goods in the possession of the vendor, or the right of the latter to stop them *in transitu*, it is to be observed that they never become the property of the purchaser (the debtor), but subject to this lien or this right. The *lex loci contractus* has first attached to the property, and the goods do not become the property of the debtor, or available to his creditors,

(*a*) Casareg. Disc. 179, n. 53, 55. Inglis *v.* Underwood, 1 East, 514. Whiston *v.* Stodder, 8 Martin's Louis Rep. 134, 136.

as subject to that law. It is, however, wholly different as to the property in respect of which the preference or privilege is claimed, and which the creditor seeks to have applied towards satisfying his alleged privileged or preferential demand. If the property be not situated *in loco contractus*, the *lex loci contractus* cannot affect it. It can be affected only, and the privilege or preference can attach to it only so far as the *lex loci rei sitæ* affects it, or subjects it to this privilege or preference. Now the *lex locus rei sitæ* if the property is immovable, is the place in which it is actually situated, and the law of that place must decide what are the liens, privileges, or preferences to which that property is subject. If, however, the property is movable, as movable property has no actual *situs*, but follows the person of its owner (the debtor), its *situs in fictione juris* is in the country of the owner (the debtor's domicil), the *lex loci contractus* cannot affect it, nor subject it, in the execution or bankruptcy, even supposing the property which had been taken in execution belonged to the debtor at the time the debt was contracted, to any privilege or preference. It can be affected only, and any privilege or preference can attach to it only so far as the law of the place of the owner, *i. e.* the debtor's domicil, at the time of the execution or bankruptcy affects it, or subjects it to any privilege or preference in favour of any creditor. Now, the execution, the *concursus* thereunder, or the bankruptcy must take place in the country of the debtor's domicil, that being the country where the movable property is situated, to the law of which country only it is subject. The privileges or preferences to which the creditor is entitled, are those only which are conferred by that law.

Rodenburg, whilst he admits that the *lex loci contractus* should be regarded "quoad ipsos contrahentes, qui eo ipso quod alio in loco contractum celebrent, ad ejusdem leges formam, vinculum, modum, conditionem, totam denique negotii

naturam, sui respectu componunt" (*a*). But at the same time he adds, "Si quid non ab actu hominis, sed à potestate legis proficiscitur, cujus modi sunt prælationis priviligia omnia, dicendum est vim legislatoris nullam esse in bona sibi non subjecta tertii respectu, seu creditorum aliorum, qui inibi nullum gesserint negotium, nec legibus loci istius se submiserint" (*b*). He maintains that this preference must depend on the law of the debtor's domicil, "Quare res ipsa monet in hâc locorum ac jurium variatione, unum certumque debere constitui locum ad cujus leges mobilia componantur. Quo ecquis alius convenientior, quam domicilii, ejus, cujus mobilia sunt, et ubi intelligunter existere, adeoque cujus loci judici potestas est privilegium in iis tribuere" (*c*). Huber, Hertius, and Matthæus adopt this opinion, in which J. Voet concurs (*d*). It is followed also in the decisions of the supreme Court of the United States (*e*).

Voet has stated the principle on which he considers that whenever the estate of the debtor has to be distributed amongst his creditors in the *concursus creditorum* under an execution sale, that distribution, and consequently the privileges and preferences of the creditors must be governed by the law of the country where the execution, sale, or bankruptcy, and consequently the distribution take place. He also states the inconveniences which must necessarily follow if that principle were not adopted. "In quæstione, cujus loci statuta in prælatione tum hypothecarium tum chirographariorum privilegio munitorum spectari debeant, dicendum

(*a*) Rodenburg de Jure, c. 5, tit. 2, p. 95. Burgund. Tr. 2, n. 21. Mævius ad Jus. Lub. lib. 3, tit. 1, Art. 11, n. 23, 25, and see D'Argentre De Briton Leg. 218, Gloss.

(*b*) Ibid.

(*c*) Ibid. p. 94.

(*d*) Matth. de Auct. lib. 1, c. 21, n. 35, *et seq.* Hub. J. P. Un. c. 10, § 44. Hert. de Coll. Leg. § 4, n. 64, p. 150, and p. 211. Voet, lib. 20, tit. 4, n. 38.

(*e*) Harrison *v.* Sterry, 5 Cranch's Rep. 289. Ogden *v.* Saunders, 12 Wheaton's Rep. 361.

videtur secundum fundamenta generalia *in tit. de const. Princip.* parte altera, *de statutis* proposita, in mobilibus debitoris bonis illum observari oportere prælationis ordinem, qui in loco domicilii debitoris probatus est; tum quia mobilia omnia, ubicunque existentia, illic domino suo præsentia esse intelliguntur, ac propterea isto quoque jure regenda sunt; tum quia creditores omnes, qui sequi in agendo debent forum rei, etiam maxime locum domicilii in contrahendo respexisse videntur, quippe in quo præcipue debitor, velut in foro præprimis competente, conveniendus est; tum denique quia, si leges vel loci in quo contractum est, vel fori in quo de creditorum prælatione ac concursu disputatur, observandas censueris, aut inexplicabilibus te difficultatibus implicaturus es, aut ad notabiles delapsurus absurditates. Etenim, si contractuum singulorum loca spectari debere contendas, explicari non poterit, quid fieri debeat, si in Hollandia, Frisia, Anglia, Italia, Hispania diversi per eundem debitorem contractus initi sint, quarum regionum unaquæque diversis ex parte, quin et subinde contrariis de protopraxia legibus utitur, dum in Anglia aut Hollandia contrahens ex legibus Anglicanis aut Hollandicis præferri desiderabit ei, qui in Frisia contraxit; hic vero ex Frisiæ legis contrariis potior esse velit eo, qui in Hollandia vel Anglia effecit sibi devinctum debitorem. Quod si locum, ubi mobilia proscribuntur, et judicium concursus inter creditores agitatur, spectandum existimes, quasi distributio pecuniarum inter creditores pars et sequela executionis sit (posito, quod alibi quam in loco domicilii postremi debitoris obærati mobilia vendi et lis de protopaxia agitari possit, cujus contrarium apud nos tunc obtinere, supra, h. t. num. 12 dictum est), absurdum illud inde sequeretur, quod tunc non mobilium tantum sed et immobilium intuitu leges loci, in quo judicium de protopraxia agitatur, observandæ forent; cum non minus distributio pecuniæ ex immobilibus, quam ex mobilibus redactæ, dici deberet executionis sequela

aut pars; atque ita fieret, immobilia non ex lege situs regi, sed incerti juris subesse, dispositioni, prout in hoc vel illo loco, diversis juribus utente, contentio fuerit inter creditores instituta de prælatione. Quin imo, posito illo jure, quod judicium universale concursus creditorum in eo loco ventilari debeat, in quo debitor, cum moretetur aut foro cederet, domicilium habuit, esse in arbitrio debitoris positum, ut migrando de loco in locum creditores non privilegiatos efficeret privilegiatos, hypothecam legalem faceret aliis nasci, aliis interire, prout aliud atque contrarium domicilii prioris aut rei sitæ legibus jus in novissimi domicilii loco viguerit: quod in immobilibus loco certo alligatis, nec arbitrio domini situm mutantibus, ferendum non est; sed potius (cum jam ad immobilia nos deduxerit ratiocinium) in immobilium pretio inter creditores secundum cujusque privilegium distribuendo servandæ erunt leges locorum illorum, in quibus immobilia singula existunt, idque convenienter regulæ in *tit. de const. Princip.* parte altera, de *statut.* n. 12, firmatæ, ac dictanti, immobilia regenda esse jure loci, in quo sita sunt" (*e*).

The effect of the fiat, sequestration, or jugement declaratif, in bankruptcy on the entire personal property of the bankrupt, furnishes an additional reason for leaving the order in which it is to be distributed amongst his creditors to be prescribed and governed by the law, which has had this effect, namely, the law of his domicil.

It is true that under the Civil Law, and the jurisprudence of Holland, Spain, and France, the debtor was not, by the proceedings consequent on his insolvency, divested of his *dominium* or property in his effects, until they were actually sold by those to whom the administration of his estate was committed. The power of administering and disposing of his whole personal property was transferred to them. He was deprived of the possession and administration of it, and was as

(*e*) Voet, lib. 20, tit. 4, n. 38. Story's Comm. 470. Matth. de Auction, lib. 1, cap. 21, n. 38, *et seq.*

incapable of making disposition of any part of it as if he had been actually divested of the *dominium* by its transfer to another.

Under the sequestration in Scotland, and the bankrupt laws of England, the debtor is not only deprived of the possession, administration, and disposition of his effects, but the absolute property in them is transferred to assignees and trustees.

Hence the judgment in bankruptcy is called universal. The cause, therefore, is individual, and if the proper jurisdiction be not resorted to, the exception may be insisted on, "*ne continentia causæ dividetur*" (*d*).

In the jurisprudence of Holland, Spain, and France, this jurisdiction, in respect of the debtor's movable property, belongs to the country of his domicil: "Sed quoniam sæpe contingit, hujusmodi decoctores et debitores fugitivos, et fraudulenter latitantes, in diversis locis merces et alia bona habere, quis erit judex competens, pro faciendâ immissione, vel venditione quorumcumque bonorum, in alieno territorio existentium? Dicendum judicem domicilii debitoris adeundum esse, ad hoc, ut cognoscat, et pronuntiet super faciendâ immissione, vel venditione quorumcumque bonorum, ubicumque locorum existentium: at executio non potest fieri per eundem judicem, sed judex territorii adiri, et pro faciendâ executione requiri debet" (*e*).

The doctrine thus stated by Gail is laid down by Rodenburg, Matthæus, P. Voet, and J. Voet, and recognised by Casaregis (*f*).

(*d*) Voet, lib. 20, tit. 4, n. 38; lib. 11, tit. 2, n. 6. Matth. de Auct. lib. 1, c. 21, n. 35, 36, 38.

(*e*) Gaill, lib. 2, Obs. 130; lib. 1, Obs. 113, n. 16.

(*f*) Rodenb. de Jure quod oritur, tit. 2, c. 5, p. 91, *et seq.* Matth. de Auct. lib. 1, c. 7, n. 10, c. 21, *et seq.* J. Voet, lib. 42, tit. 7, n. 2; lib. 20, tit. 4, n. 12. Mævius, ad Jus Lub. Part 3, tit. 1, Art. 10, n. 50; Art. 11, n. 26, *et seq.* Casareg. Disc. 130, n. 25, 26. Lauterbach, ad Pand. lib. 42, tit. 5, n. 22 tit. 7, n. 9. P. Voet, § 9, c. 2, n. 18, § 10, n. 4, *et seq.*

The same doctrine is recognised in the jurisprudence of France: "L'état de faillite frappant l'universalité de la fortune du commerçant, il est évident que le seul tribunal compétent pour en connoître, est celui de son domicile. Il faut suivre, à cet égard, les règles du droit civil sur le manière de le reconnoître et de le déterminer; et comme une société forme une personne morale, ainsi qu'on l'a vu n. 975 et 1089, c'est au tribunal du domicile social que le droit de déclarer sa faillite est attribué. Ainsi, lorsqu'un commerçant ou une société a plusieurs comptoirs ou maisons, la connoissance de sa faillite n'est point attribuée, par preférence, au tribunal dans lequel est situé l'établissement dont la cessation de paiemens, à la premiére, éveillé l'attention, mais bien à celui du domicile (*g*)."

It is founded on the principle that the movables follow the person of their owner, and are subject to the law by which he is governed.

They are subject, therefore, to such disposition of them as that law makes, whether it transfers the property to trustees or assignees, or commits to them only the possession, administration, and power of disposing, but at the same time prevents and avoids any alienation of it which the debtor might make.

On this foundation jurists maintain their doctrine on the international effect of bankrupt laws, and on the extra-territorial operation of the title of the curator, sequestrator, or assignee.

This doctrine does not seem to have been admitted in England until the middle of the last century.

According to the opinions given by Sir Joseph Jekyl and Lord Raymond when at the bar, between 1711 and 1715, and

Hommel, Rhaps. Obs. 409, n. 4; Obs. 175. Carpz, p. 1, const. 28, def. 9. Boull. Tr. des Stat. Real and Person. tit. 2, c. 5, Obs. 30, tom. 1, p. 818. Salgad's Labyrinth, Cred. Part. 1, c. 2. See Febrero, Adic. 7 vol. § 2, n. 40, ad fin.

(*g*) Pardess. Part 6, tit. 1, § 1, n. 1094.

those of other counsel taken at the same time, the Courts in England would not recognise the bankrupt laws of Holland (*h*).

It had been determined by Lord Mansfield at *nisi prius*, that where an English creditor proceeded subsequent to an act of bankruptcy by attachment in a foreign country, and obtained judgment there, and satisfaction by the sale of the debtor's personal property, the assignees in an action in England could not recover from such creditor the amount of the debt which had been remitted to him (*i*).

Lord Mansfield at the Cockpit said, "that the statutes of bankrupts do not extend to the Colonies, or any of the King's dominions out of England; but the assignments under such commissions are in the Courts abroad considered as voluntary, and, as such, take place between the assignee and the bankrupt, but do not affect the rights of any other creditors" (*j*).

In the year 1723, Lord Talbot, then at the bar, gave an opinion that, althongh the statutes of bankruptcy did not extend to the plantations, yet that the personal property of an English bankrupt in the plantations passed to the assignees (*k*).

In the year 1749 it was decided by the House of Lords, in a cause arising on the lunacy of Mr. Morison, that the committee appointed under a commission of lunacy in England, had a right to sue for and recover his property in Scotland, equally as if they held under his voluntary assignment (*l*).

In the year 1764, a case was brought before Mr. Justice Bathurst, sitting for Lord Chancellor Northington, in which

(*h*) Barel's Advysen over den Kooph, and Zecv. vol. 2, p. 291.

(*i*) Waring *v.* Knight, Sittings at Guildhall after Hil. Term, 5 Geo. 3. Cooke's B. Laws, 300.

(*j*) Cleeve *v.* Mills, at the Cockpit, July 27, 1764. Cooke's B. L. 297. Mawdesley *v.* Parke, 1779, 1 H. Bl. 680.

(*k*) Beawe's Lex Merc. p. 516, 6th ed.

(*l*) 1 H. Bl. 131, in notes.

the Court gave effect to the bankrupt laws of Holland. The parties were merchants in London, and correspondents of Messrs. Deneufvilles, merchants and partners in Amsterdam. On the 18th of December, 1759, the Deneufvilles stopped payment; on the 1st of January, 1760, the Chamber of Desolate Estates in Amsterdam took cognizance thereof, and on the next day they were declared bankrupts, and curators appointed to their estates and effects. Ross was a creditor of the bankrupts, and, two days after they had stopped payment, he made an affidavit of his debt in the Mayor's Court of London, and attached their effects in the hands of Michael Solomons, who was indebted to them. Ross obtained judgment by default on the attachment, and an execution issued against the garnishee who, being unable to pay, gave his note for the amount payable in a month. A few days afterwards, Israel Solomons, who had a power of attorney from the curators to act for them in England, filed a bill in his own name and that of the curators, praying that the garnishee might account as debtor to them, and be restrained from paying Ross. The garnishee filed a bill of interpleader, and paid the money into Court. It was decreed that the money should be paid to Israel Solomons for the benefit of the creditors of the bankrupts, and that the note should be delivered up by Ross to be cancelled. Lord Loughborough, upon this case having been cited before him in argument, stated, that this case was decided solely on the principle that the assignment of the bankrupt's effects to the curators of desolate estates in Holland was an assignment for a valuable consideration, and, therefore, acknowledged in England, agreeable to Captain Wilson's case in the House of Lords (*m*).

The next case was that of *Jollet and Reitvelt* v. *Deponthieu*

(*m*) Folliott *v.* Ogden, 1 H. Bl. 132.

and Baril (*n*), which came before Lord Chancellor Camden in 1769, and in which a similar decision was given (*o*).

Before the cases of *Solomon* v. *Ross* and *Jollet* v. *Deponthieu*, in Chancery, there had been a decision of the Privy Council in the case of *Richards and others, assignees of Buchanan and Hamilton* v. *Hudson and others* (*p*). It was an appeal from a decree of the Court of Chancery in Virginia, given against the rights of the assignees claiming the bankrupt's effects in Virginia. It was reversed by the Privy Council, and by that reversal the operation of the bankrupt laws on property situated in another country was fully established (*q*).

This question was brought before Lord Hardwicke, in the bankruptcy of Captain Wilson, of which a statement is given by Lord Loughborough in his judgment in *Sill* v. *Worswick* (*r*). In that case there were three different sets of creditors in Scotland who claimed in opposition to the English assignees the amount of considerable debts due to Wilson in Scotland. By the law of Scotland, debts are assignable, and an assignment of a debt notified to the debtor, which is technically termed an intimation, makes a specific lien, *quoad* that debt, an assignment of a debt not intimated to the debtor gives a right to the assignee to demand that debt, but it is a right inferior to that of the creditor who has obtained his assignment and intimated it. Some of the creditors had assignments of specific debts intimated to the debtors prior to the act of bankruptcy. Others had assignments of debts not intimated before the bankruptcy. Others had proceeded by process of arrestment, as it is called in the Scottish law, or, in other words, had attached the debts after the commission of the act

(*n*) 1 H. Bl. 132, n.
(*o*) Ibid.
(*p*) At the Cockpit, 1762.
(*q*) Hunter *v.* Potts, 4 Term. Rep. 187.
(*r*) 1 H. Bl. 691. 5 Brown's Supp. 821.

of bankruptcy. Lord Hardwicke and the Court of Session were of opinion that the creditors who had specific assignments of debts, with intimation to the debtors, stood in the same situation as creditors claiming by mortgage antecedent to the bankruptcy. All, therefore, he could do with respect to them, was to refuse to admit them to come in under the commission, unless they accounted for what they had obtained under their specific security. With respect to the next class of creditors, Lord Hardwicke was of opinion, as was also the Court of Session, that their title by assignment was preferable to the title by arrestment, and they likewise held, that the arrestment being subsequent to the bankruptcy, was of no avail, the property being by assignment vested in the assignees under the commission (*s*).

This doctrine was adopted in the Court of Chancery of Ireland. Grattan, a merchant in London, failed, and a commission of bankruptcy in England was issued against him on the 28th of October, 1763. On the 10th of November his effects were assigned. A debt being due in Dublin to Grattan, a creditor of his made affidavit, and commenced an action in Dublin, and on the 31st of October, three days after the commission in England, attached the debt. The creditor having obtained judgment, received 600*l.* of the debt, and afterwards a bill was filed in the Court of Chancery by the English assignees against this creditor, to have an account taken of what he had received, and a decree for payment of it with interest to the assignees. Lord Lifford, who had sat on the bench for some years in England, was Chancellor, and the question being important, and the first of the kind in Ireland, he called in the assistance of several of the Judges, and they concurred in the decree pronounced by him in favour of

(*s*) See the observations of Mr. Robertson on this case, Robertson on Pers. Success. p. 232.

the assignees, and ordered the creditor to pay them the money which he had received (*t*).

So generally was this doctrine received as a rule, that Lord Thurlow is reported to have said, "that he had no idea of any country refusing to take notice of the rights of the assignees under their laws, and he believed every country on earth would do it, besides the Courts of America" (*u*).

In 1791, the case of *Hunter* v. *Potts* was decided by the Court of King's Bench (*v*). The Court entered fully into the general doctrine, and decided, that the assignment which was executed by the commissioners of the bankrupt was sufficient to vest the bankrupt's property in Rhode Island, in the same manner as if the owner had assigned it by his own voluntary act, unless there was a positive law in the place where the property was situated to prevent it.

The case of *Sill* v. *Worswick* (*w*) was decided by the Court of Common Pleas shortly after the last-named case. The direct point decided was the same; but Lord Loughborough, the Chief Justice of that Court, entered very fully into the general doctrine: "Personal property being governed by the law of the country which governs the person of the owner, the condition of a bankrupt by the law of England is, that the law, upon the act of bankruptcy being committed, vests his property upon a just consideration, not as a forfeiture, not on a supposition of a crime committed, not as a penalty, and takes the administration of it by vesting it in assignees, who apply that property to the just purpose of the equal payment of his debts. If the bankrupt happens to have property which lies out of the jurisdiction of the law of England, if the country in which it lies proceeds according to the principles of well regulated justice,

(*t*) Neale and Another, Assignees of Grattan *v.* Cottingham, before Lord Lifford, 4 T. R. 189. 1 H. Bl. 132.

(*u*) Ex parte Blakes, 1 Cox, 398. Livermore, 151.

(*v*) 4 T. R. 182.

(*w*) 1 H. Bl. 665.

there is no doubt but that it will give effect to the title of the assignees. The determinations of the Courts of this country have been uniform to admit the title of foreign assignees." His opinion was, that the claim of the assignees was to be preferred to that of all other creditors who had not acquired a specific lien prior to the commission of the act of bankruptcy; and, in this case, if the assignees had sent to St. Christopher's a person to act for them, and had given notice of the assignment, the Court at St. Christopher's ought to have preferred the title of the assignees to the claim of the creditor using the process of attachment. He does not, however, deny that the law of the country in which the property may be, may entertain jurisdiction over that property, and by express regulation may prefer the claim of the attaching creditor to the previous assignment by the operation of the bankrupt laws, although he should consider such a determination wrong, and contrary to well established principles of the law of nations.

The case of *Phillips* v. *Hunter* (*x*) was upon the same point, and having been decided by the Court of King's Bench, in conformity with the judgment in *Hunter* v. *Potts*, a writ of error was brought into the Exchequer Chamber, and the judgment was there affirmed, by the opinion of all the Judges, except Lord Chief Justice Eyre (*y*).

When the property attached in another country becomes by the laws of that country vested in the creditor attaching, upon confirmation by its Court, the creditors attaching are entitled to hold the property attached, where the act of bankruptcy was subsequent to the completion of the judicial act, whether on the same or any other day; but where the act of bankruptcy was previous, they could not hold against the assignees (*z*).

Whenever, also, property has been duly recovered by a creditor from the bankrupt debtor, by process of local law, the

(*x*) 2 H. Bl. 402. (*y*) Ibid. 403.
(*z*) Ex parte Dobree, 8 Ves. 82.

assignees are not entitled to claim the value of it again, as against such debtor (*a*).

The English bankrupt laws do not, as to the bankrupt's personal estate, extend to the Colonies, but their effect is to vest in the assignees the debtor's personal property which may be actually there. In Jamaica, the assignees are not permitted to bring actions at law in their own names to recover debts or other effects belonging to the bankrupt, but for this purpose they are instituted in the name of the bankrupt. The assignment, as regards the legal title to sue, operates in no other way than as a voluntary assignment, and as the assignees of a *chose* in action, they could not sue in their own names, if the debt had been voluntarily assigned to them. Subject, however, to this qualification, the title of the assignees under an English commission of bankrupt to the debtor's movable estate was complete.

Neither will the bankrupt laws deprive the creditors in the colony of any right which he may have acquired under the law of the colony previously to the debtor's bankruptcy. The movable estate passes to the assignees, subject to such rights in it, as the colonial creditors had previously acquired (*b*).

A distinction has been made in a case where the bankrupt was not the sole debtor whose trade was carried on only in England, but a partner in two houses of trade originating in the West Indies, where his partners continue to carry on the business, and he himself resident in London, receiving and disposing of consignments from, and shipping cargoes to, his partners abroad. In a case of the latter description a bill was filed by his assignees against the creditor of the two firms, who had attached in the West Indies property of both, to compel him to account for what he had received by means of his attachments. The partnerships were as much West Indian as

(*a*) Le Chevalier v. Lynch, Doug. 170.

(*b*) Bruce v. Anderson, Stewart's Lower Canada Rep. p. 128.

English establishments, and it was in the West Indies that attachments were laid. It was contended for the creditor that the bankruptcy of the partner resident in England, could not affect the partners remaining at home, in a country not subject to the bankruptcy law, so as to divest them of the management of the partnership concerns or the disposition of the partnership property. If they applied the partnership assets in the payment of the partnership debts, or if, in a legal course of proceeding against them, the debts were recovered according to the law of the country, there existed, it was said, no jurisdiction in England to force a partnership creditor to refund what he had so received or recovered. The case so put, Sir W. Grant says, "appeared to me to be a very strong one. Even in the less difficult case of the attachment abroad of the property of a sole debtor residing and becoming a bankrupt in this country, I doubt whether all the reasoning of Lord Chief Justice Eyre, in *Hunter* v. *Potts*, has ever received a completely satisfactory answer. The difficulty seems to me to be insuperable, where a partnership originating in another country has at least a divided establishment, and some of the partners continue to reside and carry on the trade in that other country. How are the West Indian partners to be controlled in the management of their trade, or restrained by any proceeding here from paying and applying the partnership assets as they think fit? Equality of distribution cannot possibly be attained. Are we then to tell a creditor that, because he happens to reside in England, and his debt has been contracted there, he shall not be allowed to take such remedies against his foreign debtors as the laws of their country may permit? In the cases before the Lord Chancellor, the Court taking from the creditor his separate remedy, professed to give him his distributive share of the whole partnership property. But it cannot in this case reach the West Indian property, or bind the West Indian partners. Then you would take from the partnership creditor one remedy, without substituting any other in the place of it. This would be to

say, that the West Indian property must be left for any creditors but English creditors" (*c*).

A foreign creditor, after proving the amount of his debt by his agent at Calcutta, against the estate of P. and Co., who had been declared insolvent under the India Insolvent Act, (9 Geo. 4, c. 73,) and after receiving dividends upon his whole debt, instituted a suit in the Dutch Courts in the Island of Java, to recover an estate which was held by one of the insolvents as a trustee for his own firm of P. and Co., and that of C. and Co. in equal shares, to which suit the assignees appeared as defendants; but judgment was given in favour of the creditor, and for the sale of the estate for his benefit, the proceeeds of which amounted to three-fourths of his whole debt; and the assignees filed a bill on the equity side of the Supreme Court at Calcutta against the creditor's agent there, praying that the dividends might be refunded, and that the defendant might be enjoined from receiving any farther dividends, until all the other creditors were put upon an equal footing with the creditors at Java. Judgment was given against the assignees. The Judicial Committee of the Privy Council reversed the judgment. It is clear that the estate in Java could not pass to the assignees under the assignment, or form any part of the fund that was available for the benefit of the general creditors, for it was real or immovable property, subject to the *lex loci rei sitæ* (Java), and not to the law of Calcutta. The creditor was permitted to retain the dividends he had already received, and to receive future dividends, so that he did not receive more than 20*s*. in the pound upon his whole debt (*d*).

There had been considerable fluctuation in the decisions of the Courts in Scotland on the international effect of bankruptcy (*e*). When it adopted the principle that movables

(*c*) Brickwood *v.* Miller, 3 Mer. 279.

(*d*) Cockerill *v.* Dickens, 1 M., D. & D. 45.

(*e*) Ogilvie, 1746, 5 Brown's Sup. 280, note. Assignees of Wilson *v.*

follow the law of the owner's domicil (*e*), it could not long hesitate in applying that principle in cases of bankruptcy.

The first case in which it was applied was that of an English creditor of certain English bankrupts, who had arrested in Scotland goods belonging to the bankrupts after a commission of bankruptcy had been issued, and an assignment had been executed, under which title the assignees claimed the arrested goods. The Court preferred the English assignees, and thus rendered void, in favour of an English creditor, an arrestment used posterior to the commission and assignment (*f*). The grounds of this decision are thus stated in the elaborate judgment delivered from the bench: "The interests of commerce, as well as the regard which all nations ought to pay to the principles of general law, point out the necessity of adopting, in cases of bankruptcy, one uniform rule; and nothing can be more expedient than that we should follow out the principle already noticed, of movable effects being subject to the disposition of that law which binds the person of their owner. It is perfectly fair and equal, that when an English merchant, who happens to have personal effects here, becomes bankrupt, the law of his own country should be allowed to take his whole effects, wherever situate, into its custody, for the purpose of equal distribution among his creditors, according to the rules of the English law, while we are permitted, in the case of a Scot's bankruptcy, to do exactly the same thing in England.

Fairholm, Jan. 31, 1755, F. C. Dict. 4556. Kilk. Rep. 5 Brown's Sup. 280. Lord Monboddo's Rep. ib. 938. Thomson *v.* Tabor, and Pewtress *v.* Roberts, 1762, 1764, Dict. 4561, App. 1. Vasie *v.* Glover, Aug. 7, 1776, and Parish *v.* Khones, Feb. 23, 1775, Tait's cases, 5 Brown's Sup. 451.

(*e*) Bruce *v.* Bruce, June 25, 1788, 2 Bos. & Pul. 230, note. Bell's cases, 519, note. Hog *v.* Hog, June 7, 1791, affirmed in the Houses of Lords, May 7, 1792, Dict. 4619. Durie *v.* Coutts, Nov. 30, 1791, F. C. Dict. 4624.

(*f*) Strother *v.* Read, July 1, 1803, F. C. Dict. Forum Compet. App. 2.

The 23rd section of our late Bankrupt Law takes this for granted. The amount of the whole is, that by the commission of bankruptcy and legal assignment, the property of the personal effects becomes changed, and the bankrupt completely divested by a transfer, which in this country we ought to receive as complete, and give it the same effect as we do to our own Bankrupt Law, or as they give in England to our present law" (*g*).

This case has been ever since recognised. It was directly confirmed in a subsequent case, where the English assignees were preferred to the trustee in a Scottish sequestration in the recovery and management of the movables or personal estate (*h*).

In a subsequent case, the Scottish creditor as well as the English, was found liable to the distribution of the English bankrupt law, from the moment it attaches to a subject not already affected by a legal security (*i*).

It was also decided that diligence by arrestment, used before the assignment, but after the commission, was not available against the assignees (*j*).

But the act of bankruptcy has no relation back, so as to affect diligence, by arrestment in Scotland (*k*).

These decisions were not, however, considered to have established a rule for the case of a company having a domicil in several countries, a double domicil with a double set of creditors, each trusting to the laws of bankruptcy as established in the domicil of their debtor, the company with which they

(*g*) Strother *v.* Read, Dict. For. Comp. App. Part 1, n. 4.

(*h*) Falconer, Nov. 18, 1814, F. C. Stein's case, Jan. 20, 1813, F. C. 1 Rose's Cas. 462. 2 Ib. 311. 2 Dow's Cas. 230.

(*i*) Selkrig, Trustee for Fairholme's Creditors *v.* Bolton, Assignee for Garbet's Creditors, Nov. 20, 1805, 2 Dow's Cas. 230.

(*j*) Morrison's Assignees *v.* Watt, March 4, 1807. Maitland *v.* Hoffman, March 4, 1807, F. C. 2 Bell's Com. 684.

(*k*) Oswald's Trustees *v.* Gibbons, Winter Sessions, 1810. Hunter and Co. *v.* Palmers and Wilson, Feb. 25, 1825, F. C. 3 S. & D. 586.

transacted. It was, however, decided that the proceedings in bankruptcy in either of the domicils of the company, comprehended the whole personal estate of the entire concern (*l*).

As the jurisdiction of the Court of Session does not reach foreign countries, wherever the principle of the law of nations does not operate or has been evaded, it is provided,—1st, that the creditor who after the first deliverance on the petition for sequestration, shall obtain payment or preference abroad, shall be obliged to communicate and assign the same to the trustee for the behoof of the creditors, before he can draw any dividend out of the funds in the hands of the trustee. 2nd, that in all events, whether he claims under the sequestration or not, he shall be liable to an action before the Court of Session at the instance of the trustee, to communicate the said security or payment, in so far as the judgment of the Court can reach him (*m*). It has been doubted whether this enactment, in so far as it exposes a creditor to a challenge, even where he does not claim under the sequestration, might be held to include foreign creditors not apprised of the bankruptcy and proceedings which had taken place in Scotland, but who have recovered in the usual way the property of their debtor abroad, and should have come afterwards to Scotland (*n*).

A sequestration had been awarded in Scotland against a company carrying on trade in Scotland and Newfoundland, and the trustee was sent to Newfoundland to take the necessary proceedings there for vesting the funds in him, in order to be recovered and converted into money; he was there opposed by certain Newfoundland creditors, who claimed a preference under the act 49 Geo. 3, c. 27, conferring

(*l*) Royal Bank of Scotland *v.* Scott, Smith and Co. Jan. 20, 1813, F. C. Buchanan's Cases, 320. Rose's Cases, vol. 1, p. 462. Pardess. Droit Commer. 1094.

(*m*) 54 Geo. 3, c. 137, s. 38, 41 and 51.

(*n*) 2 Bell's Com. 686.

certain privileges on certain classes of creditors in Newfoundland, and the Judge of the Supreme Court at St. John's gave judgment against the trustee in the sequestration. Upon an appeal to his Majesty in council, the judgment of the Court in Newfoundland was reversed, and an action was brought in Scotland to compel the creditors preferred in Newfoundland to communicate to the trustee, for general distribution, the funds which they had received abroad. This case the Court of Session also decided in favour of the trustee (*o*).

The preceding principles and decisions on which the international effect of bankrupt laws is maintained, are applicable only to the movable property of the debtor.

The jurists whose opinions have been cited, admit that the authority of the Court in taking possession of the bankrupt's estate, and in the appointment of a curator, does not extend to property situated in another country. The title to immovable or real property is governed only by the law of its situs, and a transfer which is not in conformity with that law cannot confer on another nor divest the bankrupt of his *dominium* in it.

The bankrupt laws of a State can therefore transfer such immovable property only as is situated within its territory.

They cannot transfer that which is situated elsewhere.

Neither does the jurisdiction extend to the possession or administration of the debtor's real property situated in a foreign country: and hence its appointment of a curator confers no right to assume that possession, unless it is enforced by the authority of the judicial tribunal of the country in which such property is situated (*p*).

(*o*) Bennett, Trustee for Crawford and Co.'s Cred. *v.* Johnston and Others, Winter Sessions, 1819. 2 Bell's Com. 686, n.

(*p*) Gaill, lib. 2, Obs. 130. Rodenb. c. 5, tit. 2, p. 97. Voet, lib. 42, tit. 7, n. 2; lib. 20, tit. 4, n. 12. Matth. de Auct. lib. 1, c. 7, n. 10, and c. 21. P. Voet de Stat. Sect. 9, c. 2, n. 18; Sect. 4, c. 2, n. 6. Mæv. ad

In England, until the act of the 6 Geo. 4, c. 16, s. 64, the real property of the bankrupt situate abroad, could not be obtained, unless by the conveyance of the bankrupt himself; and although it might be obtained by indirect means, yet there was no legal proceeding to compel him to execute such conveyance (*q*).

By that act, and by the 1 and 2 Will. 4, c. 56, s. 26, the present and future real estate of the bankrupt, either in the United Kingdom or in any of the colonies, is vested in the assignees by virtue of their appointment without any deed or conveyance for that purpose. The certificate of appointment of the assignees is to be registered, when registry is required by the *lex loci rei sitæ*, within two months, if the property be in the United Kingdom, and if in any other place within twelve months from the date of the appointment.

The sequestration in Scotland, not only imports an obligation on the bankrupt to execute a conveyance, but carries, by force of the adjudication in favour of the trustee, all the heritable or real as well as the personal estate of the bankrupt (*r*).

In the United States, although there is a considerable weight of authority in support of the doctrine adopted by the jurisprudence of England and Scotland, yet both Mr. Chancellor Kent and Mr. Justice Story concur in considering that the preponderance of judicial authority there is opposed to it.

It had been decided in a case which was elaborately discussed, that the proceeding which was prior in point of time, was prior in point of right, and attached to itself the right to take and distribute the estate. It was considered, that as the English assignees in that case were first appointed, and the

Jus Lub. Part 3, tit. 1, Art. 10, n. 51. Burgund. Tr. 1, n. 12, 14. 1 Boull. 129, 150.

(*q*) Selkrig *v.* Davies, 2 Dow's Rep. 230, per Lord Eldon.

(*r*) Ibid. 2 Rose, 311.

assignment of the bankrupt's estate first made to them, that assignment carried the bankrupt's property wherever situated; and it consequently passed the debt due by a citizen of New York to the English bankrupt, so that a payment of such a debt to the English assignees was a good payment in bar of a claim for that same debt by the trustees, under the absconding act of that State. This rule appeared to be well settled, to be founded in justice and policy, and the comity of nations, and it rested on the principle of general jurisprudence, that personal property was deemed by fiction of law to be situated in the country in which the bankrupt had his domicil, and to follow the person of the owner; and it was to be administered in bankruptcy according to the rule of the law of that country, as if it was locally placed within it. No doubt was entertained that if the appointment of trustees under the State's act had been the first in point of time, the title of the trustees would have been recognised in the English Courts, as controlling the personal property in England. By the same rule, the English assignees, being first in time, were held entitled to control the personal property of the debtor existing in that State (*s*).

Notwithstanding the reasons and decisions on which this doctrine rested, it was considered by these learned persons, that the weight of the judicial decisions by which it was opposed preponderated (*t*), and that it is part of the settled jurisprudence of the United States that a prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor of bankrupt's effects found there; and the Courts of the United States will not subject their citizens to the inconvenience of

(*s*) Holmes *v.* Remsen, 4 Johns. Ch. Rep. 460. Goodwin *v.* Jones, 3 Mass. Rep. 517. 2 Kent's Com. 406. Story's Com. 345.

(*t*) Parsons, C. J., in Greenwood *v.* Curtis, 6 Mass. Rep. 378. Porter, J. in Olivier *v.* Townes, 14 Martin's Rep. 99. Blake *v.* Williams, 6 Pick. R. 286. Milne *v.* Morton, 6 Binn. 353.

seeking their dividends abroad, when they have the means to satisfy them under their own control.

It was the rule in Maryland prior to the revolution (*u*), and subsequently recognised (*v*), that the property of the bankrupt could be attached there, notwithstanding a prior assignment in bankruptcy in England.

The same doctrine was declared in Pennsylvania (*w*), after an elaborate discussion of the question. The Court, in that State, considered that an assignment abroad, by act of law, had no legal operation *extra territorium*, and that they were bound to look to their own law. The same doctrine was declared in North Carolina as early as 1797. It has been followed in South Carolina (*x*).

The point arose in the Supreme Court of Massachusetts (*y*), and it was held not even a voluntary assignment by an insolvent debtor in another State could control an attachment in that State, of the property of the insolvent, made subsequent to the assignment, and before payment to the assignees. In a subsequent case, in the Supreme Court of the United States, the doctrine of the law of England on this subject was peremptorily disclaimed (*z*).

This objection to the ubiquity of the operation of the bankrupt laws of a country as respects personal estates, the

(*u*) Burk *v.* M'Lean, 1 Har. & M'Henry, 286.

(*v*) Wallace *v.* Patterson, 2 ib. 463.

(*w*) Milne *v.* Moreton, 6 Binn. 353. Mulliken *v.* Auginbaugh, 1 Penn. Rep. 117.

(*x*) M'Neil *v.* Colquhoun, 2 Haywood, 24. Assignees of Topham *v.* Chapham, Con. Rep. S. C. 283. Robinson *v.* Crowder, 4 M'Cord, 519. Taylor *v.* Geary, Kirby, 313.

(*y*) Ingram *v.* Geyer, 13 Mass. Rep. 146. Fox *v.* Adams, 5 Greenleaf, 245. Olivier *v.* Townes, 14 Martin's Louis Rep. 93. Norris *v.* Mumford, 4 ib. 20, S. P.

(*z*) Ogden *v.* Saunders, 12 Wheat. 213. Blake *v.* Williams, 6 Pick. 286. Abraham *v.* Plestero, 3 Wendell, 538; 2 Kent's Com. 408. Story's Com. 346.

Courts in the United States rest on the ground that it would prejudice the rights of the subjects of the State which admitted it, and that this affords an admitted exception to the universality of the rule that personal property has no locality, but is subject to the disposition of the law of its owner's domicil (*a*).

The necessary effect of the Bankrupt Law, and of the principle that movables follow the person of their owner, and are governed by the law of the country of his domicil, seems to be that his whole personal property is withdrawn from every other jurisdiction but that of the bankrupt's domicil, and that it is subject to that order and distribution among the creditors which the law of that domicil prescribes. The creditor can participate in the distribution of that property only in the order and extent warranted by that law, notwithstanding he might, *in loco contractus* have participated in an order, and to an extent more favourable to him.

This proposition may be maintained without in any respect violating the canon of international law, which establishes the predominant influence of the *lex loci contractus* in determining on the validity of the contract, on its constitution, condition, nature, and object, and the rights and obligations which it imparts. The jurists in stating this canon have taken care to express themselves in language which would render this proposition perfectly consistent with it.

Thus Dumoulin in laying down the rule as broadly as any, and perhaps more broadly than any other Jurist, says, "In iis quæ spectant decisoria causæ et litis decisionem inspiciuntur statuta loci ubi contractus fuit celebratus quoad effectus causatos, vel causandos ex ipso contractu secundum naturam contractus" (*b*), but adds, "*nullo facto extrinseco occurrente.*" And again, "in concernentibus contractum et *emergentibus tempore contractus* spectatur

(*a*) Blake *v.* Williams, 6 Pick. 286. Olivier *v.* Townes, 14 Martin, 93, 37 to 100. Milne *v.* Moreton, 6 Binn. 353. Story's Com. 346.

(*b*) *Ante*, 80.

locus in quo contrahitur" (*c*). The language of the other jurists may be cited, conveying a similar opinion of the proper import of this canon. Now as the movable property which becomes the subject of the execution, or bankruptcy, may not have belonged to the debtor at the time of the contract, and as it is the law of the country of his domicil at the time of the execution or bankruptcy which is to determine the preferences and privileges to which his movable property is subject, it is obvious that the right to these privileges and preferences, is not that which can be said to be *emergens tempore contractus*, it cannot be said that there has been *nullum factum extrinsecum occurrens.*

Again, the expression *locus contractus* has a double sense. It imports not only the place where the contract is made, but also that in which it is to be performed or carried into effect. And when it is to be performed not in the place where it was made, but in another place, the place of performance is properly the *locus contractus*, and the law of that place will be adopted.

Thus where the performance is the payment of money, contractus autem non utique eo loco intelligitur quo negotium gestum sit, sed quo solvenda est pecunia(*d*). Everard adds, "ubi agitur de consuetudine solvendi, vel de his quæ veniunt implendi, diu ex post contractum et in alieno loco impletione destinato tunc inspicitur locus destinatæ solutionis;" Christinæus(*e*) also says, "Quoad ejus executionem utpote quoad solutionem faciendam inspicienda venit consuetudo destinatæ solutionis." And again, "Quoad ea quæ *celebrato contractu veniunt* facienda, inspicitur consuetudo loci, ubi ea debent fieri, tradi, solvi." The place in which the debt is contracted, can never, at the time the contract is made, even if the debtor *then* has his domicil there, be said to be the place in which its performance, that is, the payment is to be made to him in a *concursus* of creditors or in bankruptcy,

(*c*) *Ante*, 80. (*d*) Ibid. 86.

(*e*) Ibid.

in a manner preferential to, or more advantageous than that which the other creditors can obtain, because such a payment is contingent on the debtors retaining that domicil. In this view the place in which the contract is made, is not therefore necessarily the place of its performance. If the place where the contract is made, is not at that time the domicil of the debtor, it certainly cannot be considered the place of its performance. In neither case, then, can the law of the place where the debt is contracted determine whether the creditor is entitled to the privilege or preference which he claims, but it can only be determined by the law of the place in which the contract, as regards its preference and privileged right to payment is carried into effect, namely, in the country in which the execution and *concursus* thereunder, or the bankruptcy is prosecuted.

It has been hitherto assumed that the preference or priority in satisfaction was part of the contract. But it has been considered by jurists as belonging to, and part of the remedy for enforcing the contract, and can be claimed only when it is given by the *lex loci fori*, whether the privilege be exemption of the person or goods from arrest on mesne or final process, or process in execution. Jurists treat it as belonging to the remedies for enforcing the contract (*f*). The language of Mr. Justice Heath, adopted by Lord Ellenborough, and Lord Tenterden, and the Court of King's Bench is, that the law of the country where the contract is made can only have reference to the nature of the contract, not to the mode of enforcing it. The remedy for enforcing it must be pursued according to the law of the country in which the party seeks to enforce it (*g*).

(*f*) P. Voet de Stat. § 10, ch. 1, § 6. J. Voet, lib. 2, tit. 4, n. 45. 1 Boullen. p. 523, 4, 8, 9. Peck. de Jure Sistend, c. 8.. Mæv. de Arrest. c. 8, n. 77. Van Lecuwen Cens. For. p. 2, c. 15, n. 21, *et seq.*

(*g*) Melan *v.* Fitzjames, 1 Bos. & Pul. 138. Imlay *v.* Ellison, 2 East's Rep. 454. Delavega *v.* Vianna, 1 B. & A. 284. Talleyrand *v.* Boulanger, 3 Vez. 406.

The decisions of the United States adopt this doctrine (*h*).

It must be considered to follow from this rule, that those hypothecations, priorities, and privileges of satisfaction which may be given to the creditor by the *lex loci contractus*, if he were suing for and enforcing execution there, also belong to the remedies, and cannot be enforced *in loco fori*, unless they are given by the *lex loci fori*. Bankruptcy or sequestration, is therefore one of those remedies; it is an execution for all the debtor's creditors.

With respect to the discharge from his debts obtained by the bankrupt *in loco contractus*, it has been already shewn that it will operate as a discharge in every other country. It will, however, be matter of inquiry whether the particular debt which may be the subject of the suit in another country was that to which the discharge extended. Thus, consistently with the principles adopted by all jurists, those demands which in England were not provable under the fiat, and were not barred by the certificate, ought to be capable of being enforced by suit, and recovered in any other country, and the certificate have no greater effect than it would receive in an English Court.

(*h*) Whittemore *v.* Adams, 2 Cowen, 626. Willing *v.* Consequa, 1 Peter's Cir. Rep. 317. Courtois *v.* Charpentier, 1 Wash. Cir. Rep. 736. Bird *v.* Carital, 2 Johns. Rep. 340. Wyman *v.* Soutward, 10 Wheaton, 1. Story's Com. p. 823.

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